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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 91

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

PERRY HALSETH

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

FILED JUNE 2, 1951.
PROBABLE JURISDICTION NOTED OCTOBER 8, 1951.

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a [Caption omitted]

1 In the United States District Court for the Eastern District of Wisconsin

No. 211 Crim. T.

UNITED STATES OF AMERICA

v.

PERRY HALSETH

(Former Section 336, Title 18 U.S.C., Now Section 1302, Title 18, U.S.C.)

INDICTMENT—Filed May 9, 1949

The Grand Jury charges:

That on or about the 1st day of June 1948, at Green Bay, Brown County, in the State and Eastern Judicial District of Wisconsin and within the jurisdiction of this Court, PERRY HALSETH, knowingly, wilfully and unlawfully did cause to be delivered by mail to Miss Lucia Brown a circular letter concerning a lottery or scheme offering a prize dependent upon lot or chance, contrary to the statute in such case made and provided.

Second Count

The Grand Jury further charges:

That on or about the 12th day of May 1948 at Milwaukee County, in the State and Eastern Judicial District of Wisconsin, and within the jurisdiction of this Court, PERRY HALSETH, the identical person named in the first count of this indictment, knowingly, wilfully and unlawfully did cause to be delivered by mail to Jos. T. Kluchesky a circular letter concerning a lottery or scheme offering a prize dependent upon lot or chance, contrary to the statute in such case made and provided.

Third Count

The Grand Jury further charges:

That on or about the 10th day of June 1948 at Milwaukee County, in the State and Eastern Judicial District of Wisconsin, and within the jurisdiction of this Court, PERRY HALSETH,
2 the identical person named in the foregoing counts of this indictment, knowingly, wilfully and unlawfully did cause

to be delivered by mail to George Koch a circular letter concerning a lottery or scheme offering a prize dependent upon lot or chance, contrary to the statute in such case made and provided.

Fourth Count

The Grand Jury further charges:

That on or about the 15th day of June 1948 at Milwaukee County, in the State and Eastern Judicial District of Wisconsin, and within the jurisdiction of this Court, PERRY HALSETH, the identical person named in the foregoing counts of this indictment, knowingly, wilfully and unlawfully did cause to be delivered by mail to George Koch, Jr. a circular letter concerning a lottery or scheme offering a prize dependent upon lot or chance, contrary to the statute in such case made and provided.

Fifth Count

The Grand Jury further charges:

That on or about the 15th day of June 1948 at Milwaukee County, in the State and Eastern Judicial District of Wisconsin, and within the jurisdiction of this Court, PERRY HALSETH, the identical person named in the foregoing counts of this indictment, knowingly, wilfully and unlawfully did cause to be delivered by mail to Susan Likert a circular letter concerning a lottery or scheme offering a prize dependent upon lot or chance, contrary to the statute in such case made and provided.

3 Sixth Count

The Grand Jury further charges:

That on or about the 15th day of June 1948 at Wauwatosa, Milwaukee County, in the State and Eastern Judicial District of Wisconsin and within the jurisdiction of this Court, PERRY HALSETH, the identical person named in the foregoing counts of this indictment, knowingly, wilfully and unlawfully did cause to be delivered by mail to Richard D. Lutz a circular letter concerning a lottery or scheme offering a prize dependent upon lot or chance, contrary to the statute in such case made and provided.

Seventh Count

The Grand Jury further charges:

That on or about the 15th day of June 1948 at Milwaukee, in the State and Eastern Judicial District of Wisconsin and within the jurisdiction of this Court, PERRY HALSETH, the identical person

named in the foregoing counts of this indictment, knowingly, wilfully and unlawfully did cause to be delivered by mail to John Owen a circular letter concerning a lottery or scheme offering a prize dependent upon lot or chance, contrary to the statute in such case made and provided.

Eighth Count

The Grand Jury further charges:

That on or about the 27th day of March 1948 at Lake Geneva, Walworth County, in the State and Eastern Judicial District
4 of Wisconsin, and within the jurisdiction of this Court, PERRY HALSETH, the identical person named in the foregoing counts of this indictment, knowingly, wilfully and unlawfully did cause to be delivered by mail to Herman Stafford a circular letter concerning a lottery or scheme offering a prize dependent upon lot or chance, contrary to the statute in such case made and provided.

A True Bill.

HARRY HURST,
Foreman.

E. J. KOELZER,
Assistant United States Attorney.

[File endorsement omitted.]

5 [File endorsement omitted]

In the United States District Court

[Title omitted]

MOTION TO DISMISS

To: The Honorable Robert E. Tehan
Judge of the United States District Court
for the Eastern District of Wisconsin

Now comes the defendant, Perry Halseth, by his attorneys, and moves for an order dismissing the indictment herein, as a whole and on every count thereof, separately and severally, on the grounds to be shown to the Court at the hearing hereon, and assigns, among other reasons, the following grounds, separately and severally, for such motion, to-wit:

I. The said indictment charges no offense against the laws of the United States of America;

II. The said indictment does not set forth accurately and clearly every ingredient of the offense sought to be charged.

III. The said indictment is vague, uncertain, indefinite, and does not advise defendant of what he is required to meet, and does not contain facts sufficient to enable him to prepare his defense to said indictment or to plead the said indictment and the conviction or the acquittal thereof or thereunder as jeopardy against a subsequent indictment;

IV. The circular letter referred to in each and every count of the indictment is not pleaded with sufficient particularity to apprise the defendant as to the information contained therein alleged to concern a lottery or scheme offering a prize dependent upon lot or chance;

V. A true copy of said circular letter which will be pro-
6 duced to this Court at the hearing hereon will show to the Court that the matter alleged to have been deposited or caused to be deposited in the mails by defendant did not concern "any lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance" as proscribed by the statute sought to be invoked in said indictment, but said letter merely refers to a so-called punch card with a description thereof which card at the time of mailing and delivery was solely a piece of cardboard with certain printing thereon with perforations therein which did not represent or purport to represent any ticket, chance, share or interest in and dependent upon a lottery for the reason that no such lottery has been inaugurated, set up or put in operation or was in existence at such time and that none such might ever be inaugurated, set up or put into operation by any one by the use of such card and that if, as and when such card might be set up in the future so as to conduct a lottery and used for such purpose, such lottery would be operated outside of the mails in local jurisdictions by parties other than the defendant, with defendant taking no part in and not being connected in any way with such operation, said card showing that after the operation of a lottery by use thereof, if, as and when it might be conducted, the operator thereof, if he accepted payments for purchases, which under the language on the card are optional, the operator could use as prizes any merchandise procured from any source.

VI. The said indictment is a mere conclusion of the pleader.

Dated at Milwaukee, Wisconsin, this 6th day of July, 1949.

Respectfully submitted,

NASH & DONNELLY, of Washington, D. C.
BITKER & MARSHALL

by BRUNO V. BITKER,
Attorneys for Defendant,
208 East Wisconsin Avenue,
Milwaukee 2, Wisconsin.

In the United States District Court

[Title omitted]

STIPULATION IN RE MOTION TO DISMISS—Filed July 25, 1949

IT IS STIPULATED by and between the parties, by their respective attorneys, that for the purpose of the hearing on defendant's motion to dismiss the indictment herein, and for no other purpose, that:

1. The statute referred to by the government in each count of the indictment is Section 1302, Title 18, U.S.C., Former Section 336, Title 18.

2. The circular letters referred to in counts 1, 2, 7 and 8 are identical with the letter and other exhibits attached hereto and marked Exhibits R, R-1, R-2, R-3, R-4 and R-5.

3. The circular letters referred to in counts 3, 4, 5 and 6 are identical with the letter and other exhibits attached hereto and marked Exhibits C, C-1, C-2, C-3, C-4 and C-5.

4. Said defendant did cause to be delivered by mail the circular letter thus described in each count to the person named in each count at or about the dates indicated.

Dated at Milwaukee, Wisconsin, this 11th day of July, 1949.

For the United States of America:

E. J. KOELZER,
Asst. United States Attorney.

For the Defendant Nash & Donnelly:

BITKER & MARSHALL,
by BRUNO V. BITKER.

[File endorsement omitted.]

PERRY SALES COMPANY
417 S. Jefferson St.
Chicago 7, Ill.

EXHIBIT "R"

7a

Perry SALES COMPANY

417 S. JEFFERSON STREET
CHICAGO 7, ILLINOIS

FOR YOU—A NEW, PERSONAL SUPERHETERODYNE RADIO AS A GIFT—

You'll get many years of pleasure out of this SUPERHETERODYNE PERSONAL RADIO and here's how easily and quickly you can have one. The quality features are described on the enclosed folder.

It's very simple. Merely show the circular and card to your friends, relatives, neighbors and co-workers. Explain to them how they may obtain one of these QUALITY RADIOS, for as little as 1¢ and not more than 39¢.

The enclosed sales card has a list of names and under each seal is a number. For example—Person selecting No. 1 pays 1¢; No. 6 pays 6¢; No. 11 pays 11¢; No. 21 pays 21¢; No. 31 pays 31¢; all others pay only 39¢. NONE HIGHER! Numbers are not consecutive.

Take ADVANTAGE NOW OF THIS RARE OFFER BY WHICH YOU CAN OWN A NEW SUPERHETERODYNE RADIO.

How to send for your RADIO! Fill out the enclosed order form. Immediately upon receipt of the order we will rush to you TWO (2) SUPERHETERODYNE RADIOS and THREE higher quality Rolpoint Ball Pens.

EXTRA GIFT FOR YOU! A well made Zipper Carrying Case for your Radio will be included if the order is received in 15 days.

When you receive your new SUPERHETERODYNE PERSONAL RADIO, you'll get years of enjoyment out of it, and you'll thank us many times for giving you this unusual opportunity.

Sincerely yours,

PERRY SALES COMPANY

P. S. Should you be unable to take advantage of this offer we would appreciate your co-operation in turning the enclosed over to a reliable friend. THANK YOU!

7b

EXHIBIT "R-2"

7c

EXHEIT "R-3"

993 J

Use This Order Blank

PERRY SALES COMPANY

417 S. Jefferson St., Chicago 7, Ill.

ASE SHIP AT ONCE TO

Name_____

Address_____ Zone_____

City_____ State_____

2 TRAV-LER RADIOS

☐ IVORY AND BLUE ☐ IVORY AND RED
☐ ALL IVORY ☐ ALL WALNUT

and THREE Rolpoint Ball Pens

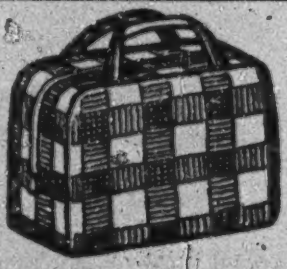
REMITTANCE ENCLOSED

☐ $29.95 PAYMENT IN FULL
☐ $2.00 DEPOSIT, BALANCE C.O.D.
☐ SHIP C.O.D. FOR FULL AMOUNT

Extra Gift

If you send your order in 15 days, you receive a

SMART ZIPPER CARRYING CASE



Mark X here ☐ If you are to receive carrying case.

NOTICE — If you enclose cashier's check or money order in full, you save paying C.O.D. fees and we prepay all shipping charges.

7d

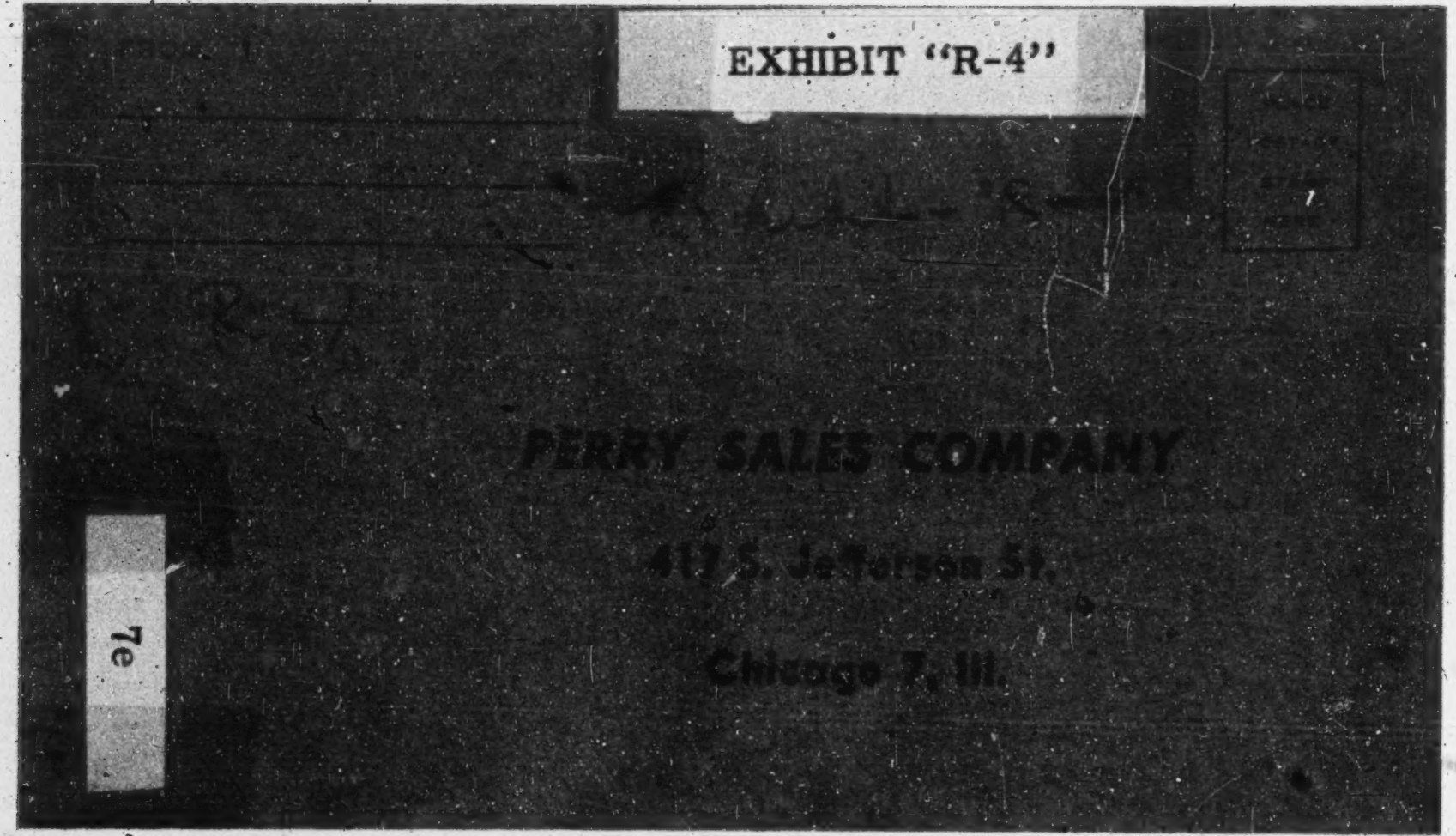
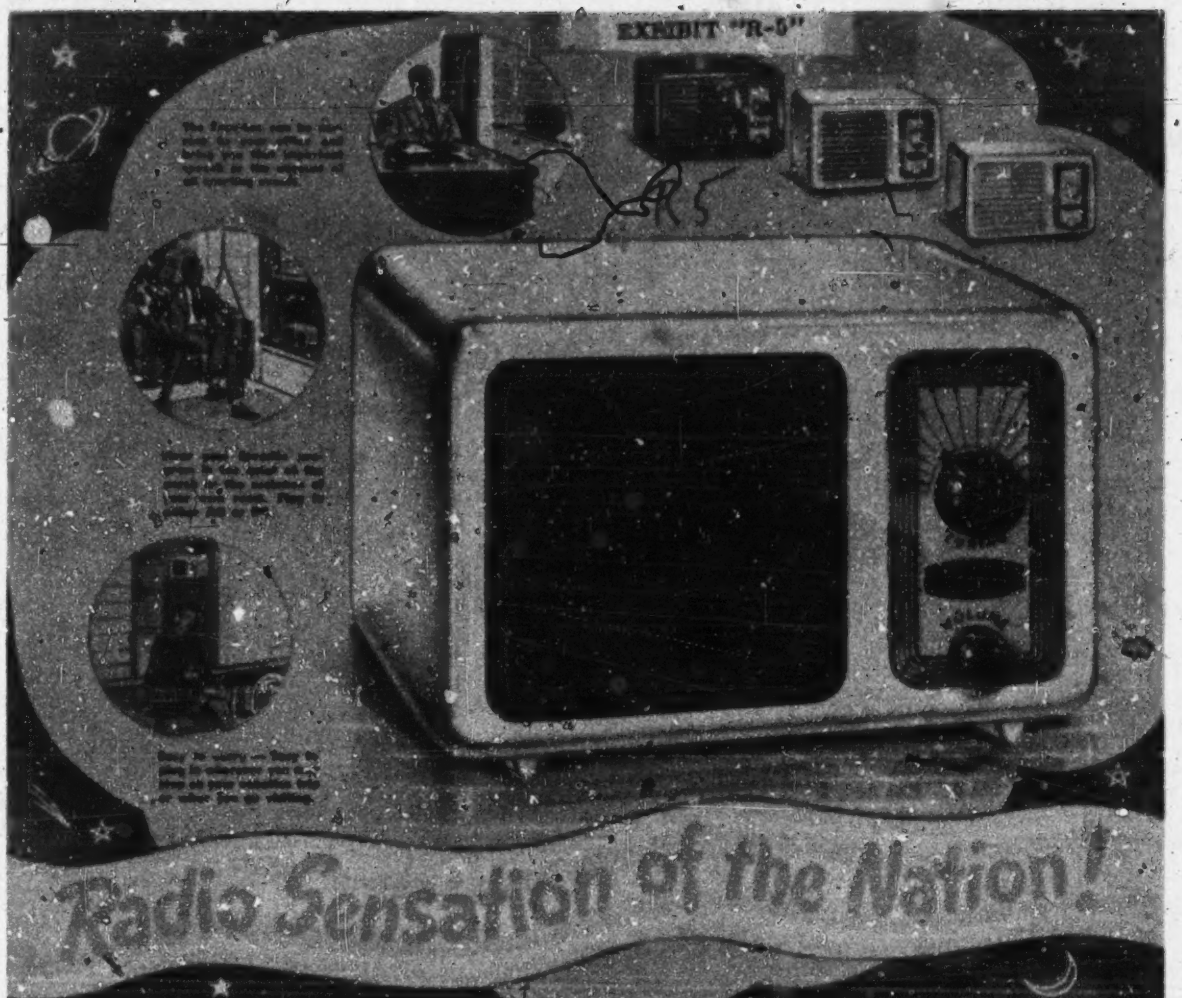


EXHIBIT "R-4"
PERRY SALES COMPANY
412 S. Jefferson St.
Chicago 7, Ill.
7e

EXHIBIT "R-5"



Radio Sensation of the Nation!

A SELECTIVE, POWERFUL PRECISION SET WITH A MARVELOUS TONE

Famous TRAV-LER Superheterodyne Radio

WITH NEW EASY-TO-CARRY CASE

- Improved circuitry for unrivaled [illegible] power and purity of tone.
- Two [illegible] assure the best possible [illegible].
- Tone valves with two dual purpose tubes.
- Beautiful plastic cabinet in [illegible] color combinations to suit [illegible].
- [illegible] Dynamic, [illegible] electrically to give [illegible] clear, natural tone.
- The only radio made for longer life and dependability.
- Full broadcast range, over 550 to 1650 kilocycles.
- Illuminated tuning [illegible].
- Shadow-Vision [illegible].
- Improved.
- Genuine Alnico V, permanent magnet dynamic speaker.
- [illegible] full vision dial.
- Plastic covered [illegible] antenna.
- Electrical [illegible] 105-125 volts A.C. or D.C. [illegible].
- Easy tuning [illegible] for non-musical persons.

Built [illegible] The radio with everything for perfect tone. Has [illegible] tone. A fine, powerful radio at [illegible] priced into the medium market. This famous Trav-Ler Radio is [illegible] engineered and precision built to stand up and deliver the finest type of radio reception. The powerful R.C.A. licensed AC-DC chassis is housed in a smart cabinet. Lightweight and compact so that you can just pick it up and go, open to the closed [illegible] position. Has [illegible] and [illegible] tone. Has not only the [illegible] sensitivity of [illegible] but also the [illegible] tone quality. The [illegible] of the radio [illegible] may be [illegible] to [illegible], with the [illegible] [illegible] [illegible] radio. Tunes [illegible] standard broadcast [illegible] R.C.A. [illegible] Dynamic speaker. Volume [illegible]. Plays [illegible] like a lamp. Your choice of colors to match any color scheme—red, blue, maroon or ivory.

Not a Midget . . BUT A MEDIUM SIZE TABLE MODEL . .

77

PERRY SALES COMPANY
417 S. Jefferson St.
Chicago 7, Ill.

EXHIBIT "C"

1

7g

13

EXHIBIT "C-1" 1-2

Perry SALES COMPANY

417 S. JEFFERSON STREET
CHICAGO 7, ILLINOIS

YES, YOU CAN RECEIVE A NEW CINEX DELUXE CAMERA--AS A GIFT TAKE COLOR OR BLACK AND WHITE PICTURES

Here's how easily and quickly you can get your fine CINEX DELUXE CAMERA PRACTICALLY AS A GIFT. Merely show the illustrations to your friends, relatives, neighbors and co-workers. Read all the features described on the enclosed folder. Explain to them how they may obtain one of these CINEX DELUXE CAMERAS for as little as 1¢ and not more than 24¢.

The enclosed sales card has a list of girls' names and under each seal is a number. For example - Person selecting No. 1 pays 1¢; No. 5 pays 5¢; No. 9 pays 9¢; No. 12 pays 12¢; No. 16 pays 16¢; all others pay only 24¢. NONE HIGHER! Numbers are not consecutive.

SIMPLE, ISN'T IT? SO, WHY DELAY? TAKE ADVANTAGE OF THIS UNUSUAL OFFER TO OWN A CINEX DELUXE CAMERA!

How to send for your CAMERA! Fill out the enclosed order form. Immediately upon receipt of the order, we will rush to you 2 CINEX DELUXE CAMERAS and 1 14 Inch All American Collapsible Telescope.

EXTRA GIFT FOR YOU! A Carrying Case for your camera will be included if the order is received in 15 days.

We know when you receive your new CINEX DELUXE CAMERA you'll treasure it for the thrills and pleasure it will give you when you see the sharp, clear black and white and color pictures it takes. And you'll thank us many times for giving you this unusual opportunity.

Sincerely yours,

PERRY SALES COMPANY

P.S. If you are unable to take advantage of this offer we would appreciate your co-operation in turning the enclosed over to a friend. THANK YOU!

7h

EXHIBIT "C-2"

7i

15

EXHIBIT "C-3"

1031 V

Use This Order Blank

PERRY SALES COMPANY

417 S. Jefferson St., Chicago 7, Ill.

PLEASE SHIP AT ONCE TO

Name _____

Address _____ Zone _____

City _____ State _____

2 CINEX DE LUXE CAMERAS

and ONE Collapsible Telescope

TTANCE ENCLOSED

- ☐ $4.99 PAYMENT IN FULL
- ☐ $1.00 DEPOSIT, BALANCE C.O.D.
- ☐ SHIP C.O.D. FOR FULL AMOUNT

Extra Gift

If you send your order in 15 days, you receive a

CARRYING CASE

With Shoulder Strap
FOR YOUR CINEX CAMERA

Mark X here ☐ If you are to receive carrying case.

NOTICE — If you enclose cashier's check or money order in full, you save paying C.O.D. fees and we prepay all shipping charges.

EXHIBIT "C-4"

[redacted]

[redacted]

[redacted]

7K

EXHIBIT "C-5"

Victory Model

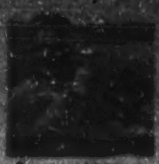
TAKES PICTURES IN COLOR AND BLACK AND WHITE

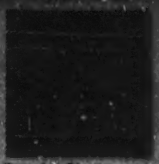
How Cinex-V Candid Camera Brings You Easy-to-Take Black and White or Color Snapshots

YES—Now you can take pictures in *NATURAL COLOR* as easily and quickly as you ever took black and white snapshots . . . at lower cost than ever before with the sensational Cinex-V Victory Model Candid Camera. Natural color is the newest craze in the photographic world—and why not? Color is everywhere. Preserve it in all its natural hue with the perfect color prints you get with the remarkable Cinex-V and Eastman Kodacolor 127C Roll Film. And, remember, Cinex-V also takes regular black and white snapshots with amazing clarity and sharpness of detail. Snapshot time is all the time—365 days a year—and you should have a camera—but when you get one—get a good one—the new Cinex-V Victory Model.

THESE QUALITY FEATURES MEAN BETTER PICTURES

- ★ Takes roll color pictures with Eastman Kodacolor 127C Roll Film
- ★ Also takes regular black and white photos with Kodak 127 or Ansco 22.
- ★ Genuine Victory lens
- ★ "Spyglass" eye level view finder—shows right and wrong
- ★ Snapshot or time exposure adjustment
- ★ Advanced design shutter with lightning fast shutter





8 In the United States District Court

No. 211 Criminal T

UNITED STATES OF AMERICA, *Plaintiff*,

vs.

PERRY HALSETH, *Defendant*

OPINION—Filed April 3, 1951

The defendant Perry Halseth was indicted and charged with having violated former Section 336, Title 18, U.S.C., which is now Section 1302, Title 18, U. S. C. The indictment contains eight counts. The first count of the indictment reads as follows:

"The Grand Jury charges:

"That on or about the 1st day of June 1948, at Green Bay, Brown County, in the State and Eastern Judicial District of Wisconsin and within the jurisdiction of this Court,

PERRY HALSETH,

knowingly, wilfully and unlawfully did cause to be delivered by mail to Miss Lucia Brown a circular letter concerning a lottery or scheme offering a prize dependent upon lot or chance, contrary to the statute in such case made and provided."

Each of the remaining seven counts is similar except that each count names a different person as the recipient of a circular letter and specifies the date of the receipt and the place where the circular was received.

The defendant has moved for an order dismissing the indictment, as a whole and on every count thereof. For the purpose of the hearing on this motion of defendant, the parties stipulated
9 to certain facts. They submitted as exhibits copies of the material referred to as circular letters in the various counts of the indictment, and it was agreed that the defendant did cause to be delivered, by mail, the circular letter thus described, to the person named in each count at or about the date indicated.

An examination of these exhibits discloses that Perry Halseth caused to be delivered to the persons named in Counts 1, 2, 7, and 8 the following material. There was a sheet of paper containing the letterhead "Perry Sales Company, 417 S. Jefferson Street,

Chicago 7, Illinois" and under this was printed the following message:

"FOR YOU—A NEW PERSONAL SUPERHETERODYNE RADIO AS A GIFT—

You'll get many years of pleasure out of this SUPERHETERODYNE PERSONAL RADIO and here's how easily and quickly you can have one. *The quality features are described on the enclosed folder.*

It's very simple. Merely show the circular and card to your friends, relatives, neighbors and co-workers. Explain to them how they may obtain one of these QUALITY RADIOS, for as little as 1¢ and not more than 39¢.

The enclosed sales card has a list of names and under each seal is a number. For example—Person selecting No. 1 pays 1¢; No. 6 pays 6¢; No. 11 pays 11¢; No. 21 pays 21¢; No. 31 pays 31¢; all others pay only 39¢. NONE HIGHER! Numbers are not consecutive.

Take ADVANTAGE OF THIS RARE OFFER BY WHICH YOU CAN OWN A NEW SUPERHETERODYNE RADIO.

How to send for your RADIO! Fill out the enclosed order form. Immediately upon receipt of the order we will rush to you TWO (2) SUPERHETERODYNE RADIOS and THREE higher quality Rolpoint Ball Pens.

10 EXTRA GIFT FOR YOU! A well made Zipper Carrying Case *for your* Radio will be included if the order is received in 15 days.

When you receive your new SUPERHETERODYNE PERSONAL RADIO, you'll get years of enjoyment out of it, and you'll thank us many times for giving you this unusual opportunity.

Sincerely yours,

FERRY SALES COMPANY.

P. S. Should you be unable to take advantage of this offer, we would appreciate your co-operation in turning the enclosed over to a reliable friend. THANK YOU!

The circular referred to in this printed message was a colored illustration and printed matter extolling the beauty and quality of a "medium size table model" radio. The sales card referred to was [illegible] commonly known as a punch board. It also featured a picture of the same radio portrayed in the circular. The card also [illegible] the following printed message:

"Lucky name under seal received a —— —— radio. Choice of 4 colors. No. 1 pays 1¢ No. 6 pays 6¢ No. 11 pays 11¢

No. 21 pays 21¢ No. 31 pays 31¢ All others pay only 39¢ NONE HIGHER!

There was then a short summary of the virtues of the radio. The front side of the card also contained this message:

"3 extra winners Nos. 22, 33, 44, each receives a Rolpoint Ball Pen $5 value"

The face of the card revealed one larger size semi-perforated circle within which was printed: "Do not remove seal until entire card is sold", and 80 smaller semi-perforated circles in each of which was printed a three-letter common name. On the reverse side of the card were printed the 80 names, each with a line beside it, and below these, this message:

"This card contains eighty names. No. 1 pays 1¢, No. 6 pays 6¢, No. 11 pays 11¢, No. 21 pays 21¢, No. 31 pays 31¢, all others pay only 39¢. NONE HIGHER. This card is given to you absolutely free. You can use as sales card if you wish. It can be used with any merchandise. Prospective purchaser is not obliged to pay unless he desires to do so. IF YOU DESIRE TO PURCHASE MERCHANDISE FROM US YOU CAN DO SO AT ANY TIME.

TOTAL $29.95

POSTMASTER: This parcel may be opened for postal inspection if necessary."

Along with the aforementioned material, the persons named in the indictment received an order blank for the two radios and three ball-point pens and a printed return address envelope.

The persons named in Counts 3, 4, 5, and 6 of the indictment received similar material, except that the merchandise featured was a candid camera.

The defendant listed six grounds for his motion and at the oral hearing on the motion raised three additional objections to the indictment. The nine grounds thus put forward by the defendant may, for the purpose of discussion, be roughly classed into three groups and the defendant has adopted this classification in his briefs on the motion. The first major classification raises the question of whether on the face of the indictment an offense is charged. The second group alleges that if the indictment were informative and alleged the additional facts contained in the stipulation, no proscribed act would have been established. The third group of objections to the indictment rests on technical grounds. Because it seems to this court to be the decisive issue, the court

shall first consider the second question of whether a proscribed act has been established.

12 Accepting the stipulation as revealing the full facts in regard to the mailing, we see that the defendant was engaged in the sale of merchandise to individuals and that to further his undertaking, he was encouraging and promoting the use of punch boards by these individuals. The government has charged that the defendant's use of the mails in this respect constitutes a violation of law.

Former Section 336 of Title 18, U.S.C., which was in force prior to September 1, 1948, the effective date of the new Criminal Code provided in part:

> "No letter, package, postal card, or circular concerning any lottery, * * * or similar scheme offering prizes dependent in whole or in part upon lot or chance; * * * shall be deposited in or carried by the mails * * * Whoever shall knowingly deposit * * * anything to be * * * delivered by mail in violation of * * * this section * * * shall be fined * * * or imprisoned * * *"

The present Section 1302 of the new Title 18, U.S.C., provides in part:

> "Whoever knowingly deposits in the mail, or sends or delivers by mail, Any letter, package, postal card, or circular concerning any lottery, * * * or similar scheme offering prizes dependent in whole or in part upon lot or chance; * * * Shall be fined * * * or imprisoned * * *"

It is the position of the defendant that under either of the above statutes there can be no crime unless at the time the circular is mailed there is a lottery or similar scheme in existence or at least definitely set up. In support of his contention he cites several cases. The strongest of these is the case of *United States v.*

13 *Irvine, et al*, 156 Fed. 376. This case arose under a statute which was essentially similar to that now under consideration. The defendant was charged with having mailed an advertisement of a lottery and demurred to the indictment. The court quoted from the opinion in *United States v. Bailey*, 47 Fed. 117:

> "I do not think this indictment defective for failing to show how and in what manner the circulars set forth in the several counts concern a lottery. It is sufficient, in my opinion, to charge in the words of the statute the fact that they do concern a lottery, without setting forth the evidence going to show that fact. But I think the indictment defective, because it fails to aver the existence of any lottery, or of an intention to

hold any lottery or drawing for prizes to which the circulars set forth relate. The circulars upon their face do not show that they concern or in any way relate to a lottery. In such a case, the existence of a lottery, or of a scheme for a lottery, or of an intention to hold some lottery or drawing for prizes, to which the circulars relate, must be proved by other evidence than the circulars themselves. The fact should therefore be averred."

The court sustained the demurrer to the indictment in the Irvine case since it found that the indictment did not allege the existence of the lottery. The court said:

"* * * It is essential therefore that the existence must be alleged, as it must be proven to establish the offense. * * *"

The government has cited the case of *Boasberg v. United States*, 80 F. 2d 185 as authority for the proposition that the lottery or similar scheme need not be in existence at the time that the mailing of "a circular letter concerning a lottery or scheme" takes place. I have carefully studied the Boasberg opinion and I fail to find such an implication in its language. In that case the indictment charged that the defendant had mailed—

"'a circular and advertisement concerning a scheme offering prizes dependent upon lot or chance similar to a lottery addressed to George M. Carnes, etc., reading as follows: 'Suburban Gardens Will Inaugurate a New Innovation for the Better People of New Orleans Keno $100.00 or More to the Winner Every Roll Commencing February 5th, 1930. Doors open at 6:30 P.M., first game at 7 P.M. M. Boasberg.'"

The defendant was found guilty by a jury and he appealed. The appellate court first discussed the question of whether testimony that keno was usually played as set forth in the indictment was properly admitted. Then the court discussed the question of whether the indictment sufficiently described the scheme which the circulars concerned. Finally the court considered what it said was the real question in the case—whether a scheme to run keno games is a scheme offering prizes dependent in whole or in part upon lot or chance and similar to a lottery or a gift enterprise. The court decided each of the issues adversely to the defendant. The government in this case argues that the Boasberg case demonstrates that the statute can be violated although the scheme offered prizes dependent upon lot or chance is to take place in the future. It must first be said, I think, that the Boasberg opinion does not discuss this question. Secondly, I feel that there is a substantial difference between the Boasberg case where the defendant who

did the mailing had plainly indicated his intent to personally operate such a scheme and the instant case where the defendant who did the mailing could at best only hope that the punch boards would be used as he desired. I do not find that the Boasberg case lends any support to the position of the government in the case at bar.

The defendant in further support of his position that the existence of a lottery is an essential element of the crime which he is charged with having violated, cites the case of *Stockton v. United States*, 205 F. 462. The opinion in the Stockton case was written by Judge Geiger of this court sitting as a circuit judge. The statute involved was a companion statute to the one in question. It provided in part:

> "'Whoever, having devised or intended to devise any scheme or artifice to defraud, or for obtaining * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States,'" etc.

The indictment charged the defendant with having mailed a catalogue advertising such gambling devices as marked cards and loaded dice to a prospective purchaser of such equipment. The court held that assuming the marked cards and loaded dice were to be used by the purchaser to cheat or defraud in gambling nevertheless the seller did not violate the statute by sending the catalogue through the mail. The government in that case alleged that the defendant intended to induce one Moore and one Nichols to purchase gambling apparatus from him by sending them the catalogues, and that the defendant intended that said Moore and Nichols engage persons at play and defraud them. The court said:

> "* * * Now, if plaintiff in error had, through personal solicitation, sold or offered to sell this apparatus to Moore and Nichols; or if they had called at his place of business and entered into and concluded negotiations with him, there would in each case be present every element disclosed in the indictment. The *mailing* of the catalogue is not an element of the scheme; the arbitrary allegation of the intention of plaintiff in error that Moore and Nicho would engage persons in play, etc., is in effect an allegation of knowledge on his part that such purchasers would put the apparatus to a use for which it was obviously intended—and it adds and can add nothing unless and until by appropriate averment of facts it appears

that he was to be in some relation of confederacy or par-
16 ticipation, beneficial or otherwise, in such use. The real scheme or artifice to *defraud*, if any, is that devised and perpetrated by the possessors of the apparatus when they use it. The actual intent of the plaintiff in error was coextensive only with his transaction in selling or offering to sell;—and in case he sold—the subject-matter being disclosed and known—his whole intention and expectation would have been fully realized. His relation to the matter would have been at an end; and, granting that Nichols and Moore would or might defraud persons as alleged in the indictment, they would not do so upon the prompting nor in obedience to any act or intention of the plaintiff in error. * * *"

This language is applicable to the case at bar. There would be no lottery or scheme offering a prize dependent upon lot or chance unless the purchasers put the punch boards to use. While it is obvious that the defendant hoped and perhaps even had good reason to believe that the punch boards would be put to use, this hope or belief that there would be a "scheme" in existence does not make the mailing of the circulars in this instance a violation of the statute.

Still further evidence of the fact that the statute, properly construed, does not prohibit what this defendant has done is apparent from an examination of the legislative history of attempts to amend the statute. Thus, the record of a hearing before a subcommittee of the Committee on Post Offices and Post Roads of the United States Senate held on April 21, 1932 indicates the Post Office Department was then, and had for many years been sponsoring legislation to strengthen the anti-lottery laws to prohibit such mailing as that now in question. Quoting from that record we repeat the testimony of Mr. Calvin W. Hassell of the Post Office Department in support of S. 182, a bill to amend Title 18, Sec. 336, U.S.C. (the statute involved in the instant case):

17 "Mr. Hassell. Legislation similar to that proposed in this bill, with the exception of the words referred to in this letter the chairman has just read, has been recommended by the Post Office Department for a great many years. The necessity for this legislation comes about by reason of the fact that the present lottery statutes, which are very broad when considered in connection with going lottery schemes, does not cover lottery devices and advertisements thereof.

"That came about by reason of the decision of the Supreme Court of the United States in France v. United States, in 1895 (164 U.S. 676), holding that matter relating to lotteries not set up and in operation was not within the lottery statutes.

"The provision with respect to cheating gambling devices is necessary by reason of the decision of the circuit court of appeals for the seventh circuit, in the case of Stockton v. United States, decided in 1913, in 205 Fed., 462. In the Stockton case, the purveyor of cheating-gambling devices through the mails was prosecuted under the fraud statutes (18 U.S. Code, 338), and his conviction was reversed by the circuit court of appeals, which held that the sale through the mails of cheating-gambling devices did not come within the purview of the postal fraud statute.

"The department has had a great many inquiries from individuals as to why the laws are so strictly enforced with respect to the transmission of matter through the mails relating to going lottery schemes, and yet lottery devices, including all of the prizes to be awarded, are mailable under the present law.

"Senator Frazier. It is the opinion, then, of the department that something of this kind is necessary to bar this so-called gambling paraphernalia from being eligible to the mails?

"Mr. Hassell. Yes, Senator.

"Senator Sheppard. And literature and letters regarding it.

"Senator Frazier. Yes."

The history of the administration of this statute indicates that while the statute itself (former Title 18, U.S.C., Section 336) declared that material concerning lotteries or gift enterprises or similar schemes offering prizes dependent in whole or in part upon lot or chance shall not be deposited or carried in the mails or delivered by any postmaster or letter carrier, the Post Office Department has not seen fit to apply the statute to the type of material involved in the instant action.

In the light of all of this background, the prior court decisions and the legislative and administrative history, I feel that the court cannot now find that the statute applies to the type of material sent by the defendant without, in effect, rewriting the statute. This would be obviously improper because it is fundamental that it is to the Congress and not the courts to which we must apply for changes in our Federal laws. Justice demands that a change in the law be announced by Congress so that the citizenry will know what they must do or not do in the future. To say that this indictment charges an offense is, in effect, therefore to enact an ex post facto law. This we will not do.

Ordinarily this opinion would now be concluded by setting forth the mandate of the court. However, the implications of this opinion constrain me to make one final observation.

In the promotion of his merchandise sales this defendant makes a well calculated appeal to the gambling instincts of his prospective purchasers through the enclosure of the device with which each could conduct a little game of chance. This sort of appeal, I presume, finds some acceptance among people of every kind and description, but I venture the opinion that the great majority of the punch boards that are actually used are those which fall into the hands of children of tender ages. The serious moral implications involved are too apparent to require laboring on my part.

The postal authorities have been fully aware of this evil and have repeatedly asked Congress to plug the loopholes exposed by earlier court decisions, but Congress has not yet seen fit
19 so to do.

During these past few months the Congress, through a committee of the Senate has been making an investigation of gambling, and other types of vice with the end in mind of the enactment of Federal legislation to deal with this problem. The state of the law relative to the use of the mails for distributing devices which are designed for gambling uses should be referred to if it already has not. The tremendous impact of the revelations of the Committee upon the citizens of this country has created a climate insuring passage of wholesome legislation designed to stop these evil practices.

The motion of the defendant will be granted. Counsel for the defendant will submit an order in conformity with this opinion.

Dated at Milwaukee, Wisconsin, this 3rd day of April, 1951.

ROBERT E. TEHAN.

[File endorsement omitted.]

20 IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER TO DISMISS—Filed April 4, 1951

The motion of the defendant herein for an order dismissing the indictment herein as a whole and on every count thereof, separately and severally, having duly come on for hearing before this Court, and the Court having heard oral argument and studied the written briefs in record herein, and having rendered an opinion granting the motion,

IT IS ORDERED that the indictment herein as a whole and on every count thereof be and it is hereby dismissed.

Dated at Milwaukee, Wisconsin, this 4th day of April, 1951.

(S.) ROBERT E. TEHAN,
United States Judge.

[File endorsement omitted.]

21 IN THE UNITED STATES DISTRICT COURT

[Title omitted]

DOCKET ENTRIES

1949		
May	9	Bill of Indictment, filed.
"	"	Order for warrant of arrest and fixing bail in the sum of $10,000.
"	"	Warrant of arrest issued.
"	13	Warrant of arrest returned executed May 13, 1949.
"	"	Appearance bond of deft. in the sum of $7500 with cash bail, filed.
July	12	Motion of defendant for an order dismissing the indictment, with notice, filed.
"	25	Stipulation in re motion of defendant to dismiss indictment, filed.
"	"	Hearing on motion of deft. to dismiss indictment—taken under consideration.
Sept.	14	Transcript of proceedings upon motion of defendant to dismiss indictment, filed.
1951		
Apr.	3	Opinion of the Court on motion of the deft. for an order dismissing the indictment—granting said motion and directing attorney for defendant to submit an order in conformity with the opinion, filed.
"	4	Order dismissing indictment.
"	"	Notice to parties of entry of order dismissing the indictment, filed.
"	"	Order for return of cash bail in the sum of $7500.00 to Bruno V. Bitker, Attorney for defendant.
May	2	Notice of Appeal of U. S. of America, plaintiff appellant, in duplicate, filed.
"	"	Statement as to jurisdiction of the U. S. Supreme Court, in duplicate, filed.
"	3	Duplicate notice of appeal of U. S. of America, plaintiff appellant, together with statement of docket entries forwarded to Clerk, U. S. Supreme Court, Washington, D. C.
"	"	Notification to appellee of appeal taken by the United States, filed.
"	18	Statement opposing jurisdiction and motion to affirm or dismiss, filed.
"	22	Designation of contents of record on appeal, filed.

22 In the United States District Court

[Title omitted]

NOTICE OF APPEAL—Filed May 2, 1951

The United States hereby appeals to the Supreme Court of the United States from the order of the United States District Court for the Eastern District of Wisconsin, entered April 4, 1951, dismissing the indictment charging the defendant with violations of 18 U.S.C. (1946 ed.) 336.

Dated May 2, 1951.

(S.) PHILIP B. PERLMAN,
Solicitor General,
Department of Justice,
Washington, D. C.

[File endorsement omitted.]

23 Notification to Appellee Under Rule 12 (Omitted in Printing).

24-25 Designation of Record on Appeal (Omitted in Printing).

26 Designation of Additional Contents of Record on Appeal (Cmitted in Printing).

27 Clerk's Certificate to foregoing transcript omitted in prnting.

28 In the Supreme Court of the United States, October Term, 1951

[Title omitted]

STATEMENT OF POINTS TO BE RELIED UPON AND DISIGNATION OF RECORD—Filed June 13, 1951

Pursuant to Rule 13, paragraph 9 of this Court, appellant states that it intends to rely upon the following points:

1. The District Court erred in holding that the mailing of a punch board and circular carrying an illustration of merchandise to be won as prizes and a description of how such merchandise could beobtained through use of the punch board to sell chances, did not constitute mailings "concerning any lottery" within the intendment of Section 213 of the Criminal Code (now 18 U.S.C. 1302).

2. The District Court erred in holding that, under the scheme for selling merchandise through use of the punch boards to sell

chances, no lottery came into existence until the person to whom the punch board was mailed put it to use.

3. The District Court erred in granting the motion to dismiss the indictment.

Appellant deems the entire record, as filed in the above-entitled case, necessary for the consideration of the points relied on.

June 13, 1951.

PHILIP B. PERLMAN,
Solicitor General.

[File endorsement omitted.]

29 Supreme Court of the United States, October Term, 1951

No. 91

[Title omitted]

ORDER—OCTOBER 8, 1951.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary docket.

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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1951

THE UNITED STATES OF AMERICA, APPELLANT,

v.

PERRY HALSETH

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

STATEMENT AS TO JURISDICTION

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

No. 211 Criminal T

UNITED STATES OF AMERICA

v.

PERRY HALSETH

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, and Rule 37(a) of the Federal Rules of Criminal Procedure the United States submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the order of the District Court in this cause dismissing the indictment.

OPINION BELOW

The opinion of the District Court dismissing the indictment has not been reported. A copy of the opinion is attached hereto as an appendix.

JURISDICTION

The order of the District Court dismissing the indictment was entered April 4, 1951. The juris-

diction of the Supreme Court to review on direct appeal an order of a District Court dismissing an indictment where such dismissal is based on the construction of the statute on which the indictment is founded is conferred by the Criminal Appeals Act, 18 U.S.C. 3731. See also Rule 37(a)(2), F. R. Crim. P. The applicability of the Criminal Appeals Act to a situation where as in this case the indictment is amplified by an agreed statement of facts is established by the decision in *United States* v. *Lem Hoy*, 330 U.S. 724, 725.

QUESTION PRESENTED

Whether a punch board carrying an illustration of merchandise to be won as prizes, and a circular explaining how much merchandise can be obtained through use of the punch board, constitute mailings "concerning any lottery" within the intendment of Section 213 of the Criminal Code (now 18 U.S.C. 1302).

STATUTE INVOLVED

Section 213 of the Criminal Code (18 U.S.C., 1946 ed., 336) provided, in pertinent part, as follows:

> No letter, package, postal card, or circular concerning any lottery, * * * or similar scheme offering prizes dependent in whole or in part upon lot or chance; * * * shall be deposited in or carried by the mails * * *. Whoever shall knowingly deposit * * * anything to be * * * delivered by mail in viola-

tion of * * * this section * * * shall be fined * * * or imprisoned * * *.

This section was reenacted as Section 1302 of the 1948 revision of the Criminal Code and now reads:

> Whoever knowingly deposits in the mail, or sends or delivers by mail: Any letter, package, postal card, or circular concerning any lottery, * * * or similar scheme offering prizes dependent in whole or in part upon lot or chance; * * * Shall be fined * * * or imprisoned * * *.

STATEMENT

An 8-count indictment was returned against defendant in the United States District Court for the Eastern District of Wisconsin, each count charging that he violated Section 213 of the Criminal Code by causing to be mailed a circular letter concerning a lottery or scheme offering a prize dependent upon lot or chance. For the purpose of a motion to dismiss the indictment, the parties stipulated that certain materials offered as exhibits were mailed by defendant, and that such exhibits constituted the matter described in the indictment as circular letters. The District Court held that if the indictment had alleged the additional facts contained in the stipulation it would not have charged an offense under the statute. The Court accordingly granted defendant's motion to dismiss the indictment.

Four of the counts were based on material relating to radios, the other four on material relating to cameras. Since the nature of the mailings was the same except for the merchandise offered, it is sufficient to consider, as did the District Court, only the material relating to radios.

The mailings consisted of the following material:

(1) A sheet of paper bearing the letterhead of the Perry Sales Company on which was printed the following message:

> FOR YOU—A NEW, PERSONAL
> SUPERHETERODYNE RADIO *as a Gift*—
>
> You'll get many years of pleasure out of this SUPERHETERODYNE PERSONAL RADIO and here's how easily and quickly you can have one. *The quality features are described on the enclosed folder.*
>
> It's very simple. Merely show the circular and card to your friends, relatives, neighbors and co-workers. Explain to them how they may obtain one of these QUALITY RADIOS, for as little as 1¢ and not more than 39¢.
>
> The enclosed sales card has a list of names and under each seal is a number. For example Person selecting No. 1 pays 1¢; No. 6 pays 6¢; No. 11 pays 11¢; No. 21 pays 21¢; No. 31 pays 31¢; all others pay only 39¢. NONE HIGHER! Numbers are not consecutive.

TAKE ADVANTAGE OF THIS RARE OFFER BY WHICH YOU CAN OWN A NEW SUPERHETERODYNE RADIO.

How to send for your RADIO! Fill out the enclosed order form. Immediately upon receipt of the order we will rush to you Two (2) SUPERHETERODYNE RADIOS and THREE higher quality Rolpoint Ball Pens.

EXTRA GIFT FOR YOU! A well made Zipper Carrying Case *for your* Radio will be included if the order is received in 15 days.

When you receive your new SUPERHETERODYNE PERSONAL RADIO, you'll get years of enjoyment out of it, and you'll thank us many times for giving you this unusual opportunity.

Sincerely yours,

PERRY SALES COMPANY.

P. S. Should you be unable to take advantage of this offer, we would appreciate your cooperation in turning the enclosed over to a reliable friend. THANK YOU!

(2) A punch board which featured a picture of the same radio portrayed in the circular. The card also bore the following printed message:

Lucky name under seal received a ..... radio. Choice of 4 colors. No. 1 pays 1¢ No. 6 pays 6¢ No. 11 pays 11¢ No. 21 pays 21¢ No. 31 pays 31¢ All others pay only 39¢ NONE HIGHER

3 extra winners Nos. 22, 33, 44, each receives a Rolpoint Ball Pen $5 value

The face of the card revealed one larger size semi-perforated circle within which was printed, "Do not remove seal until entire card is sold", and 80 smaller semi-perforated circles in each of which was printed a three-letter common name. On the reverse side of the card were printed the 80 names, each with a line beside it, and below these, this message:

> This card contains eighty names. No. 1 pays 1¢, No. 6 pays 6¢, No. 11 pays 11¢, No. 21 pays 21¢, No. 31 pays 31¢, all others pay only 39¢. NONE HIGHER. This card is given to you absolutely free. You can use as Sales card if you wish. It can be used with any merchandise. Prospective purchaser is not obliged to pay unless he desires to do so. IF YOU DESIRE TO PURCHASE MERCHANDISE FROM US YOU CAN DO SO AT ANY TIME.
>
> TOTAL $29.95
>
> POSTMASTER: This parcel may be opened for postal inspection if necessary.

(3) A circular extolling the radio.

(4) An order blank for two radios and three ball point pens.

(5) A printed return address envelope.

The District Court held that under Section 213 of the Criminal Code and the present 18 U.S.C. 1302, mailings "concerning any lottery" must re-

late to a lottery which is already in existence. It further held that, under the facts as stipulated, there would be no lottery unless the person receiving the material mailed by defendant put the punch cards to use, and that defendant's belief that the punch cards would be used did not bring the lottery into existence at the time the material was mailed. The court referred to the prior failure of the Post Office Department to apply the statute to similar mailings and to efforts of the Department to have the statute amended as further indication that the statute was not designed to reach material of the type involved in this case.

THE QUESTION IS SUBSTANTIAL

The issue presented by this appeal is one of importance in the enforcement of the laws preventing misuse of the mails. There have been an increasing number of attempts to sell merchandise through gambling schemes of the type here involved, with particular emphasis on the type of merchandise that appeals to young children. Under the decision of the District Court the Post Office Department would be powerless to prevent the use of the mails to further such attempts to stimulate gambling instincts.

The language of the statute, past and present, clearly covers the mailing involved in the instant case. A punch board is a plan offering prizes "dependent in whole or in part upon lot or chance." Defendant's circulars describing how to get mer-

chandise through use of the punch board are upon their face circulars "concerning" such a plan.

The District Court's interpretation of defendant's scheme as not relating to a lottery until the recipient puts the punch board to use is unrealistic. The scheme was set up and in operation when the mailings occurred. Defendant had fixed the prizes, determined the price, and established the machinery by which distribution was to be made. The fact that some recipients of the mailings might not make use of the punch boards did not change the character of the scheme as a plan for the distribution of prizes by lot. Persons to whom ordinary lottery tickets are sent may or may not buy such tickets. The lottery nevertheless exists. Here defendant sent out circular letters setting forth a plan for winning prizes by lot. Instead of selling chances himself, he deputized others to sell the chances. However, defendant's interest in the scheme continued, since he sent the merchandise offered as prizes only after the money received from selling chances had been collected and remitted. The difference between that plan and an ordinary lottery is a difference of form but not of essential character.

The decision of the District Court stems from a misinterpretation of the decision in *Stockton* v. *United States*, 205 Fed. 462 (C.A. 7), where the court held that the mail fraud statute (Section 215 of the Criminal Code) did not apply to the mailing

of a catalogue advertising for sale marked cards, loaded dice, etc. The court said that "the real scheme or artifice to defraud, if any, is that devised and perpetrated by the purchasers of the apparatus when they use it." There is, however, a marked difference between the mere selling of a gambling device and the type of scheme involved in the instant case. The seller of the gambling device makes his profit from the sale; he has no interest in the use to which the device is later put. Here defendant made not profit from the punch board as such; he made his profit from the money received from the sale of chances on the punch board. Not until the chances were sold did he receive his money. He set up the scheme and he received the proceeds of the sales by lot; he was thus the instigator and the real perpetrator of the lottery.

The District Court's reference to attempts to amend the statute reflects a similar failure to distinguish between the mere sale of gambling devices and a scheme to distribute merchandise through the use of a gambling device. The material quoted in the court's opinion shows that the effort to amend the statute was primarily directed toward overcoming the effect of the *Stockton* decision, which, as we have shown, is inapplicable to the facts in the instant case. In any event, no administrative or legislative inaction can undermine the force of the clear meaning of the statute to cover the acts charged in this case. See *Ex parte Collette*, 337

U.S. 55, 61; *Estate of Sanford* v. *Commissioner*, 308 U.S. 39, 52-53.

It is submitted that the decision of the District Court is erroneous and that the question presented by this appeal is a substantial one which should be settled by the Supreme Court.

Respectfully submitted.

(S.) PHILIP B. PERLMAN,
Solicitor General.

MAY 1951.

APPENDIX

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF WISCONSIN

No. 211 Criminal T

UNITED STATES OF AMERICA, PLAINTIFF

vs.

PERRY HALSETH, DEFENDANT

OPINION

The defendant Perry Halseth was indicted and charged with having violated former Section 336, Title 18, U.S.C., which is now Section 1302, Title 18, U.S.C. The indictment contains eight counts. The first count of the indictment reads as follows:

> "The Grand Jury charges:
>
> "That on or about the 1st day of June, 1948, at Green Bay, Brown County, in the State and Eastern Judicial District of Wisconsin and within the jurisdiction of this Court,
>
> PERRY HALSETH,
>
> knowingly, wilfully and unlawfully did cause to be delivered by mail to Miss Lucia Brown a circular letter concerning a lottery or scheme offering a prize dependent upon lot or chance, contrary to the statute in such case made and provided."

Each of the remaining seven counts is similar except that each count names a different person as the recipient of a circular letter and specifies the

date of the receipt and the place where the circular was received.

The defendant has moved for an order dismissing the indictment, as a whole and on every count thereof. For the purpose of the hearing on this motion of defendant, the parties stipulated to certain facts. They submitted as exhibits copies of the material referred to as circular letters in the various counts of the indictment, and it was agreed that the defendant did cause to be delivered, by mail, the circular letter thus described, to the person named in each count at or about the date indicated.

An examination of these exhibits discloses that Perry Halseth caused to be delivered to the persons named in Counts 1, 2, 7, and 8 the following material. There was a sheet of paper containing the letter head "Perry Sales Company, 417 S. Jefferson Street, Chicago 7, Illinois" and under this was printed the following message:

> "FOR YOU—A NEW, PERSONAL
> SUPERHETERODYNE RADIO AS A GIFT—
>
> You'll get many years of pleasure out of this SUPERHETERODYNE PERSONAL RADIO and here's how easily and quickly you can have one. *The quality features are described on the enclosed folder.*
>
> It's very simple. Merely show the circular and card to your friends, relatives, neighbors and co-workers. Explain to them how they may obtain one of these QUALITY RADIOS, for as little as 1¢ and not more than 39¢.
>
> The enclosed sales card has a list of names and under each seal is a number. For example

—Person selecting No. 1 pays 1¢; No. 6 pays 6¢; No. 11 pays 11¢; No. 21 pays 21¢; No. 31 pays 31¢; all others pay only 39¢. NONE HIGHER! Numbers are not consecutive.

TAKE ADVANTAGE OF THIS RARE OFFER BY WHICH YOU CAN OWN A NEW SUPERHETERODYNE RADIO.

How to send for your RADIO! Fill out the enclosed order form. Immediately upon receipt of the order we will rush to you TWO (2) SUPERHETERODYNE RADIOS and THREE higher quality Rolpoint Ball Pens.

EXTRA GIFT FOR YOU! A well made Zipper Carrying Case *for your* Radio will be included if the order is received in 15 days.

When you receive your new SUPERHETERODYNE PERSONAL RADIO, you'll get years of enjoyment out of it, and you'll thank us many times for giving you this unusual opportunity.

Sincerely yours,

PERRY SALES COMPANY.

P. S. Should you be unable to take advantage of this offer, we would appreciate your cooperation in turning the enclosed over to a reliable friend. THANK YOU!

The circular referred to in this printed message was a colored illustration and printed matter extolling the beauty and quality of a "medium size table model" radio. The sales card referred to was what is commonly known as a punch board. It also featured a picture of the same radio portrayed

in the circular. The card also bore the following printed message:

> "Lucky name under seal received a..... radio. Choice of 4 colors. No. 1 pays 1¢ No. 6 pays 6¢ No. 11 pays 11¢ No. 21 pays 21¢ No. 31 pays 31¢ All others pay only 39¢ NONE HIGHER"

There was then a short summary of the virtues of the radio. The front side of the card also contained this message:

> "3 extra winners Nos. 22, 33, 44, each receives a Rolpoint Ball Pen $5 value"

The face of the card revealed one larger size semi-perforated circle within which was printed: "Do not remove seal until entire card is sold", and 80 smaller semi-perforated circles in each of which was printed a three-letter common name. On the reverse side of the card were printed the 80 names, each with a line beside it, and below these, this message:

> "This card contains eighty names. No. 1 pays 1¢, No. 6 pays 6¢, No. 11 pays 11¢, No. 21 pays 21¢, No. 31 pays 31¢, all others pay only 39¢. NONE HIGHER. This card is given to you absolutely free. You can use as sales card if you wish. It can be used with any merchandise. Prospective purchaser is not obliged to pay unless he desires to do so. IF YOU DESIRE TO PURCHASE MERCHANDISE FROM US YOU CAN DO SO AT ANY TIME.

TOTAL $29.95

POSTMASTER: This parcel may be opened for postal inspection if necessary.

Along with the aforementioned material, the persons named in the indictment received an order blank for the two radios and three ball-point pens and a printed return address envelope.

The persons named in Counts 3, 4, 5, and 6 of the indictment received similar material, except that the merchandise featured was a candid camera.

The defendant listed six grounds for his motion and at the oral hearing on the motion raised three additional objections to the indictment. The nine grounds thus put forward by the defendant may, for the purpose of discussion, be roughly classed into three groups and the defendant has adopted this classification in his briefs on the motion. The first major classification raises the question of whether on the face of the indictment an offense is charged. The second group alleges that if the indictment were informative and alleged the additional facts contained in the stipulation, no prescribed act would have been established. The third group of objections to the indictment rests on technical grounds. Because it seems to this court to be the decisive issue, the court shall first consider the second question of whether a proscribed act has been established.

Accepting the stipulation as revealing the full facts in regard to the mailing, we see that the defendant was engaged in the sale of merchandise to individuals and that to further his undertaking, he was encouraging and promoting the use of punch

boards by these individuals. The government has charged that the defendant's use of the mails in this respect constitutes a violation of law.

Former Section 336 of Title 18, U.S.C., which was in force prior to September 1, 1948, the effective date of the new Criminal Code provided in part:

> "No letter, package, postal card, or circular concerning any lottery, * * * or similar scheme offering prizes dependent in whole or in part upon lot or chance; * * * shall be deposited in or carried by the mails * * * Whoever shall knowingly deposit * * * anything to be * * * delivered by mail in violation of * * * this section * * * shall be fined * * * or imprisoned * * *"

The present Section 1302 of the new Title 18, U.S.C., provides in part:

> "Whoever knowingly deposits in the mail, or sends or delivers by mail, Any letter, package, postal card, or circular concerning any lottery, * * * or similar scheme offering prizes dependent in whole or in part upon lot or chance; * * * Shall be fined * * * or imprisoned * * *"

It is the position of the defendant that under either of the above statutes there can be no crime unless at the time the circular is mailed there is a lottery or similar scheme in existence or least definitely set up. In support of his contention he cites several cases. The strongest of these is the case of *United States v. Irvine, et al,* 156 Fed. 376. This

case arose under a statute which was essentially similar to that now under consideration. The defendant was charged with having mailed an advertisement of a lottery and demurred to the indictment. The court quoted from the opinion in *United States v. Bailey*, 47 Fed. 117:

> "I do not think this indictment defective for failing to show how and in what manner the circulars set forth in the several counts concern a lottery. It is sufficient, in my opinion, to charge in the words of the statute the fact that they do concern a lottery, without setting forth the evidence going to show that fact. But I think the indictment defective, because it fails to aver the existence of any lottery, or of an intention to hold any lottery or drawing for prizes to which the circulars set forth relate. The circulars upon their face do not show that they concern or in any way relate to a lottery. In such a case, the existence of a lottery, or of a scheme for a lottery, or of an intention to hold some lottery or drawing for prizes, to which the circulars relate, must be proved by other evidence than the circulars themselves. The fact should therefore be averred."

The court sustained the demurrer to the indictment in the Irvine case since it found that the indictment did not allege the existence of the lottery The court said:

> "* * * It is essential therefore that the existence must be alleged, as it must be proven to establish the offense. * * *"

The government has cited the case of *Boasberg v. United States*, 60 F. 2d 185, as authority for the proposition that the lottery or similar scheme need not be in existence at the time that the mailing of "a circular letter concerning a lottery or scheme" takes place. I have carefully studied the Boasberg opinion and I fail to find such an implication in its language. In that case the indictment charged that the defendant has mailed—

> " 'a circular and advertisement concerning a scheme offering prizes dependent upon lot or chance similar to a lottery addressed to George M. Carnes, etc., reading as follows: "Suburban Gardens Will Inaugurate a New Innovation for the Better People of New Orleans Keno $100.00 or More to the Winner Every Roll Commencing February 5th, 1930. Doors open at 6:30 P.M., first game at 7 P.M. M. Boasberg." ' "

The defendant was found guilty by a jury and he appealed. The appellate court first discussed the question of whether testimony that keno was usually played as set forth in the indictment was properly admitted. Then the court discussed the question of whether the indictment sufficiently described the scheme which the circulars concerned. Finally the court considered what it said was the real question in the case—whether a scheme to run keno games is a scheme offering prizes dependent in whole or in part upon lot or chance and similar to a lottery or a gift enterprise. The court decided each of the issues adversely to the defendant. The government in this case argues that the Boasberg case demonstrates that the statute can be violated

although the scheme offering prizes dependent upon lot or chance is to take place in the future. It must first be said, I think, that the Boasberg opinion does not discuss this question. Secondly, I feel that there is a substantial difference between the Boasberg case where the defendant who did the mailing had plainly indicated his intent to personally operate such a scheme and the instant case where the defendant who did the mailing could at best only hope that the punch boards would be used as he desired. I do not find that the Boasberg case lends any support to the position of the government in the case at bar.

The defendant in further support of his position that the existence of a lottery is an essential element of the crime which he is charged with having violated, cites the case of *Stockton* v. *United States*, 205 F. 462. The opinion in the Stockton case was written by Judge Geiger of this court sitting as a circuit judge. The statute involved was a companion statute to the one in question. It provided in part:

> "'Whoever, having devised or intended to devise any scheme or artifice to defraud, or for obtaining * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States,'" etc.

The indictment charged the defendant with having mailed a catalogue advertising such gambling devices as marked cards and loaded dice to a pros-

pective purchaser of such equipment. The court held that assuming the marked cards and loaded dice were to be used by the purchaser to cheat or defraud in gambling nevertheless the seller did not violate the statute by sending the catalogue through the mail. The government in that case alleged that the defendant intended to induce one Moore and one Nichols to purchase gambling apparatus from him by sending them the catalogues, and that the defendant intended that said Moore and Nichols engage persons at play and defraud them. The court said:

> "* * * Now, if plaintiff in error had, through personal solicitation, sold or offered to sell this apparatus to Moore and Nichols; or if they had called at his place of business and entered into and concluded negotiations with him, there would in each case be present every element disclosed in the indictment. The *mailing* of the catalogue is not an element of the scheme; the arbitrary allegation of the intention of plaintiff in error that Moore and Nichols would engage persons in play, etc., is in effect an allegation of knowledge on his part that such purchasers would put the apparatus to a use for which it was obviously intended—and it adds and can add nothing unless and until by appropriate averment of facts it appears that he was to be in some relation of confederacy or participation, beneficial or otherwise, in such use. The real scheme or artifice to *defraud,* if any, is that devised and perpetrated by the possessors of the apparatus when they use it. The actual intent of the plaintiff

> in error was coextensive only with his transaction in selling or offering to sell;—and in case he sold—the subject-matter being disclosed and known—his whole intention and expectation would have been fully realized. His relation to the matter would have been at an end; and, granting that Nichols and Moore would or might defraud persons as alleged in the indictment, they would not do so upon the prompting nor in obedience to any act or intention of the plaintiff in error. * * *"

This language is applicable to the case at bar. There would be no lottery or scheme offering a prize dependent upon lot or chance unless the purchasers put the punch boards to use. While it is obvious that the defendant hoped and perhaps even had good reason to believe that the punch boards would be put to use, this hope or belief that there would be a "scheme" in existence does not make the mailing of the circulars in this instance a violation of the statute.

Still further evidence of the fact that the statute, properly construed, does not prohibit what this defendant has done is apparent from an examination of the legislative history of attempts to amend the statute. Thus, the record of a hearing before a subcommittee of the Committee on Post Offices and Post Roads of the United States Senate held on April 21, 1932 indicates the Post Office Department was then, and had for many years been sponsoring legislation to strengthen the anti-lottery laws to prohibit such mailing as that now in question. Quoting from that record we repeat the testimony of Mr. Calvin W. Hassell of the Post Office Depart-

ment in support of S. 182, a bill to amend Title 18, Sec 336, U.S.C. (the statute involved in the instant case):

"Mr. HASSELL. Legislation similar to that proposed in this bill, with the exception of the words referred to in this letter the chairman has just read, has been recommended by the Post Office Department for a great many years. The necessity for this legislation comes about by reason of the fact that the present lottery statutes, which are very broad when considered in connection with going lottery schemes, does not cover lottery devices and advertisements thereof.

"That came about by reason of the decision of the Supreme Court of the United States in France v. United States, in 1895 (164 U.S. 676), holding that matter relating to lotteries not set up and in operation was not within the lottery statutes.

"The provision with respect to cheating gambling devices is necessary by reason of the decision of the circuit court of appeals for the seventh circuit, in the case of Stockton v. United States, decided in 1913, in 205 Fed. 462. In the Stockton case, the purveyor of cheating-gambling devices through the mails was prosecuted under the fraud statutes (18 U. S. Code, 338), and his conviction was reversed by the circuit court of appeals, which held that the sale through the mails of cheating-gambling devices did not come within the purview of the postal fraud statute.

"The department has had a great many inquiries from individuals as to why the laws are so strictly enforced with respect to the transmission of matter through the mails relating to going lottery schemes, and yet lottery devices, including all of the prizes to be awarded, are mailable under the present law.

"Senator FRAZIER. It is the opinion, then, of the department that something of this kind is necessary to bar this so-called gambling paraphernalia from being eligible to the mails?

"Mr. HASSELL. Yes, Senator.

"SENATOR SHEPPARD: And literature and letters regarding it.

Senator FRAZIER. Yes."

The history of the administration of this statute indicates that while the statute itself (former Title 18, U.S.C., Section 336) declared that material concerning lotteries or gift enterprises or similar schemes offering prizes dependent in whole or in part upon lot or chance shall not be deposited or carried in the mails or delivered by any postmaster or letter carrier, the Post Office Department has not seen fit to apply the statute to the type of material involved in the instant action.

In the light of all of this background, the prior court decisions and the legislative and administrative history, I feel that the court cannot now find that the statute applies to the type of material sent by the defendant without, in effect, rewriting the statute. This would be obviously improper because it is fundamental that it is to the Congress and not the courts to which we must apply for changes in our Federal laws. Justice demands that a change

in the law be announced by Congress so that the citizenry will know what they must do or not do in the future. To say that this indictment charges an offense is, in effect, therefore to enact an ex post facto law. This we will not do.

Ordinarily this opinion would now be concluded by setting forth the mandate of the court. However, the implications of this opinion constrain me to make one final observation.

In the promotion of his merchandise this defendant makes a well calculated appeal to the gambling instincts of his prospective purchasers through the enclosure of the device with which each could conduct a little game of chance. This sort of appeal, I presume, finds some acceptance among people of every kind and description, but I venture the opinion that the great majority of the punch boards that are actually used are those which fall into the hands of children of tender ages. The serious moral implications involved are too apparent to require laboring on my part.

The postal authorities have been fully aware of this evil and have repeatedly asked Congress to plug the loopholes exposed by earlier court decisions, but Congress has not yet seen fit so to do.

During these past few months the Congress, through a committee of the Senate has been making an investigation of gambling, and other types of vice with the end in mind of the enactment of Federal legislation to deal with this problem. The state of the law relative to the use of the mails for distributing devices which are designed for gambling uses should be referred to if it already has not. The tremendous impact of the revelations of the Committee upon the citizens of this country has created

a climate insuring passage of wholesome legislation designed to stop these evil practices.

The motion of the defendant will be granted. Counsel for the defendant will submit an order in conformity with this opinion.

Dated at Milwaukee, Wisconsin, this 3rd day of April 1951.

ROBERT E. TEHAN.

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In the Supreme Court of the United States

OCTOBER TERM, 1951

UNITED STATES OF AMERICA, *Appellant*

v.

PERRY HALSETH

On Appeal from the United States District Court for the Eastern District of Wisconsin

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BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District Court dismissing the indictment (R. 19-27) has not been reported.

JURISDICTION

The order of the District Court dismissing the indictment was entered April 4, 1951 (R. 27). The United States filed its notice of appeal to this Court on May 2, 1951 (R. 29). Probable jurisdiction was noted by this Court on October 8, 1951 (R. 30). The jurisdiction of this Court to review

on direct appeal the order of the District Court dismissing the indictment where such dismissal is based on the construction of the statute on which the indictment is founded is conferred by the Criminal Appeals Act, 18 U.S.C., Supp. IV, 3731. See also Rule 37(a)(2), F. R. Crim. P. The applicability of the Criminal Appeals Act to a situation where as in this case the indictment is amplified by an agreed statement of facts is established by the decision in *United States* v. *Lem Hoy*, 330 U. S. 724, 725.

QUESTION PRESENTED

Whether the mailing by defendant of a punch board and a circular which solicited the addressee to sell chances on the punch board for specified, illustrated prizes and offered to ship the prizes, together with a gift for the addressee, upon receipt of the aggregate amount of the chances on the punch board, was a mailing concerning a lottery and therefore a violation of Section 213 of the Criminal Code.

STATUTE INVOLVED

Section 213 of the Criminal Code of 1909, 35 Stat. 1129-1130 (18 U.S.C., 1946 ed., 336), provided, in pertinent part, as follows:

> No letter, package, postal card, or circular concerning any lottery, * * * or similar scheme offering prizes dependent in whole or in part upon lot or chance, * * * shall be deposited in or carried by the mails * * *. Whoever shall

knowingly deposit * * * anything to be * * * delivered by mail in violation of * * * this section * * * shall be fined * * * or imprisoned * * *.[1]

STATEMENT

An 8-count indictment was returned against defendant in the United States District Court for the Eastern District of Wisconsin, each count charging that on a specified date he violated Section 213 of the Criminal Code by causing to be mailed to a named person "a circular letter concerning a lottery or scheme offering a prize dependent upon lot or chance" (R. 1-3). For the purpose of a motion to dismiss the indictment, the parties stipulated that certain materials offered as exhibits were mailed by defendant, and that such exhibits constituted the matter described in the indictment as circular letters (R. 5). The District Court held that if the indictment had alleged the additional facts contained in the Exhibits attached to the stipulation, it would not have charged an offense

---

[1] Section 213 of the Criminal Code was repealed, effective September 1, 1948, by Section 21 of the Act of June 25, 1948, 62 Stat. 683, 862, which codified and enacted into law Title 18 of the United States Code. The mailings alleged in the indictment in this case were made before the repeal. However, Section 21 of the codifying Act provides that any rights or liabilities existing under the repealed sections shall not be affected by the repeal.

Provisions substantially similar to those which appeared in the repealed Section 213 of the Criminal Code now appear in 18 U.S.C., Supp. IV, 1302.

under the statute. The court accordingly granted defendant's motion to dismiss the indictment (R. 27).

Four of the counts were based on material relating to radios and ball point pens (R. 8-12), the other four on material relating to cameras and a telescope (R. 14-18). Since the nature of the mailings was the same except for the merchandise offered, it is sufficient to consider, in the main, as did the District Court (R. 21), only the material relating to radios and pens.

The mailings concerning the radios and pens consisted of the following material:

(1) A sheet of paper (R. 8) bearing the letterhead of the Perry Sales Company on which was printed the following message:

FOR YOU—A NEW, PERSONAL
SUPERHETERODYNE RADIO
AS A GIFT—

You'll get many years of pleasure out of this SUPERHETERODYNE PERSONAL RADIO and here's how easily and quickly you can have one.[2] *The quality features are described on the enclosed folder.*

---

[2] In the circular for the camera similar language was followed by the words "PRACTICALLY AS A GIFT" (R. 14). Amounts to be paid by buyers of tickets of course corresponded with the different punch board for the camera, as noted *infra*, p. 6, footnotes 3, 4; p. 7, footnote 5.

It's very simple. Merely show the circular and card to your friends, relatives, neighbors and co-workers. Explain to them how they may obtain one of these QUALITY RADIOS, for as little as 1c and not more than 39c.

The enclosed sales card has a list of names and under each seal is a number. For example —Person selecting No. 1 pays 1c; No. 6 pays 6c; No. 11 pays 11c; No. 21 pays 21c; No. 31 pays 31c; all others pay only 39c. NONE HIGHER! Numbers are not consecutive.

Take ADVANTAGE OF THIS RARE OFFER BY WHICH YOU CAN OWN A NEW SUPERHETERODYNE RADIO.

How to send for your Radio! Fill out the enclosed order form. Immediately upon receipt of the order we will rush to you Two (2) SUPERHETERODYNE RADIOS and THREE higher quality Rolpoint Ball Pens.

EXTRA GIFT FOR YOU! A well made Zipper Carrying Case *for your* Radio will be included if the order is received in 15 days.

When you receive your new SUPERHETERODYNE PERSONAL RADIO, you'll get years of enjoyment out of it, and you'll thank us many times for giving you this unusual opportunity.

Sincerely yours,

PERRY SALES COMPANY.

P.S. Should you be unable to take advantage of this offer, we would appreciate your cooperation in turning the enclosed over to a reliable friend. THANK YOU!

(2) A punch board (R. 9) which featured a picture of the radio referred to in the circular. The board also bore the following printed message:

Lucky name under seal receives a Superheterodyne Trav-ler radio. Choice of 4 colors. No. 1 pays 1c No. 6 pays 6c No. 11 pays 11c No. 21 pays 21c No. 31 pays 31c. All others pay only 39c NONE HIGHER[3]

* * *

3 extra winners Nos. 22, 33, 44, each receives a Rolpoint Ball Pen $5 value[4]

On the face of the board there appeared one larger size semi-perforated circle within which was printed, "Do not remove seal until entire card is sold," and 80 smaller semi-perforated circles in each of which was printed a three-letter common name. On the reverse side of the card were printed the 80 names, each with a line beside it, and below these names, this message (R. 21):

This card contains eighty names. No. 1 pays 1c, No. 6 pays 6c, No. 11 pays 11c, No. 21 pays

---

[3] In the punch board for the camera the prices ranged from 1¢ to 24¢ (R. 15).

[4] In the punch board for the camera No. 19 receives a telescope (R. 15).

21c, No. 31 pays 31c, all others pay only 39c. NONE HIGHER. This card is given to you absolutely free. You can use as sales card if you wish. It can be used with any merchandise. Prospective purchaser is not obliged to pay unless he desires to do so. IF YOU DESIRE TO PURCHASE MERCHANDISE FROM US YOU CAN DO SO AT ANY TIME.

Total $29.95 [5]

POSTMASTER: This parcel may be opened for postal inspection if necessary.

(3) A circular extolling the radio (R. 12),

(4) An order blank as follows (R. 10):

Use This Order Blank

PERRY SALES COMPANY
417 S. Jefferson St., Chicago 7, Ill.

PLEASE SHIP AT ONCE TO
Name
Address Zone
City State

---

[5] For the punch board concerning the camera there were only 24 punches (R. 15) and the total amount was $4.99 (R. 16).

2 TRAV-LER RADIOS

[] Ivory and Blue [] Ivory and Red
[] All Ivory [] All Walnut
and THREE Rolpoint Ball Pens
Remittance enclosed
[] $29.95 Payment in Full
[] $2.00 Deposit, Balance C.O.D.
[] Ship C.O.D. for Full Amount

EXTRA GIFT

If you send your order in 15 days, you receive a SMART ZIPPER CARRYING CASE [Picture of carrying case]

Mark X here [] if you are to receive carrying case.

NOTICE—If you enclose cashier's check or money order in full, you save paying C.O.D. fees and we repay all shipping charges.

(5) A printed return address envelope (R. 11).

The District Court held that under Section 213 of the Criminal Code mailings "concerning any lottery" must relate to a lottery which is already in existence, and held that, under the facts as stipulated, there would be no lottery unless the person receiving the material mailed by defendant put the punch cards to use. The court further held that defendant's belief that the punch cards would be used did not bring the lottery into existence at

the time the material was mailed (R. 22-25). The court referred to the prior failure of the Post Office Department to apply the statute to similar mailings, and to efforts of the Department to have the statute amended, as further indication that the statute was not designed to reach material of the type involved in this case (R. 25-26).

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred:

1. In holding that the mailing of a punch board and circular carrying an illustration of merchandise to be won as prizes and a description of how such merchandise could be obtained through use of the punch board to sell chances, did not constitute mailings "concerning any lottery" within the intendment of Section 213 of the Criminal Code, supra, pp. 2-3.

2. In holding that, under the scheme for selling merchandise through use of the punch boards to sell chances, no lottery came into existence until the person to whom the punch board was mailed put it to use.

3. In granting the motion to dismiss the indictment.

SUMMARY OF ARGUMENT

I

A. Defendant had an established lottery when he mailed the circular. Prizes depending on chance were specified and offered in the circular.

and were illustrated on the punch board which accompanied it. Tickets to be sold for compensation had been fully prepared and placed on the punch board ready for sale and drawing. Defendant agreed in the circular to deliver the prizes in return for a sum exactly equal to the amounts to be paid by the purchasers for the tickets. His scheme had all of the elements of a lottery (*Horner* v. *United States*, 147 U. S. 449), and all that was needed was a mailing designed to bring the opportunity to the public.

B. Defendant's contention that his circular contained a mere offer to the addressee to purchase his merchandise, and thus did not involve a lottery; is without merit. His circular plainly intended a solicitation to the addressee to sell tickets on the lottery which had already been established. The offer contained in defendant's circular is to be distinguished from the so-called package deals wherein a retailer buys outright and takes immediate delivery of candy, etc., together with punch boards, and then later seeks to raffle off the merchandise without any further responsibility on the part of the seller. Here, the offer was not made to persons who were in business as retailers but to private individuals who were importuned to contact their friends, relatives, neighbors, and co-workers. And the defendant plainly assumed the responsibility of making good the prizes and "gift" after the exact amount of money received from the sale of the punch board tickets had been remitted to him.

As compensation for selling the tickets the addressee of the circular was offered a "gift" which was substantially equal to the value of the prize to be given to the winner of the lottery, a proposition inconsistent with an outright sale. Furthermore, the mailings embodied no reasonable warning that the addressee was deemed to be a buyer of the prizes and his own "gift," or that he was to take full responsibility for making good the prizes after the drawings from the punch board had been completed. Nor was there anything in the mailings to indicate that title to the prizes would ever pass to the addressee as distinguished from the winner of the lottery.

In the circumstances of this case, it is clear that the defendant's relation to the lottery carried through the sale of the tickets and the delivery of the prizes. Consequently, the defendant's circular was a solicitation to the addressee to sell the punch board tickets, and was not merely an outright offer to sell the merchandise offered as prizes and gifts.

II

A solicitation to an addressee to sell tickets for a lottery is within the prohibition of the statute. It is not defensible on the hypothesis that the solicitation might not be successful. A circular offering tickets directly to purchasers might equally be unavailing and the lottery might never be completed, but the circular would nevertheless consti-

tute a violation of the statute. The history of this legislation discloses that it is, by reason of its purpose and its use of the very broad and inclusive word "concerning," a prohibition of the widest scope. Any implied exception would necessarily have to rest upon complete lack of intent and effect to further a lottery. Decisions relied upon by the defendant for their language to the effect that a lottery must be in existence when the prohibited action takes place are inapposite; the language used in those cases involved different statutes containing narrower provisions which indicated that they were to be inapplicable to lotteries which had already been completed. Thus, *France* v. *United States*, 164 U. S. 676, and *United States* v. *Irvine*, 156 Fed. 376 (D. Ore.), are not controlling here.

III

The judge below placed some reliance upon certain efforts of the Post Office Department to obtain an amendment of the statute, more than 19 years ago. He also referred to certain omissions of the Department with respect to the enforcement of the statute. But the early efforts to obtain an amendment to facilitate enforcement did not have reference to an integrated scheme such as the defendant has evolved, nor did it assume that such a scheme would be legal. The efforts, rather, were directed toward facilitating actions in the case of outright sales of lottery paraphernalia where no

connection was retained by the seller. In January 1948, prior to the date of the mailings here involved, the Department issued instructions clearly condemning as illegal the mailing of a punch board and sale of prizes if funds for the purchase of the prizes were to be raised by use of the punch board. This would, *a fortiori*, show the position of the Department in the present case where not even the element of a purchase by the addressee was contemplated.

IV

While the present case does not pose the question whether the statute applies to a solicitation to act as independent operator of a lottery or to purchase lottery paraphernalia, we submit that the case may be decided on the broader ground that such a solicitation is prohibited equally with a solicitation, as here, to become a mere ticket seller. The prohibition of all mailings "concerning" a lottery, in sharp contrast with the narrower language of other statutes, is extremely inclusive both in its intent and effect. While a mailing in the case of a completed lottery may or may not be one "concerning any lottery," a mailing concerning a lottery yet to be established is clearly within the letter and purposes of the statute.

ARGUMENT

I

Defendant's Punch Board and Circular Providing for and Offering Prizes of Merchandise to Be Won By Chance Constituted an Established Lottery, and the Circular Which Solicited the Addressee to Sell the Lottery Tickets Neither Contemplated Nor Effected a Solicitation for the Mere Purchase of Merchandise.

A. There is no dispute as to defendant's acts prior to the mailings here involved. With respect to each mailing he had established prizes, which were clearly specified in the circular and on the punch board accompanying the circular. He had provided the tickets and so placed them in the punch board that a purchaser of a ticket would or would not win one of the prizes, depending upon chance. He had agreed to deliver the prizes upon receipt of a sum exactly equal to the aggregate of the amounts to be paid by the purchasers of the chances (*supra*, pp. 3-8). These are all of the elements necessary to the existence of a lottery. *Horner* v. *United States*, 147 U. S. 449, 458-459. It is beyond controversy, therefore, that defendant's punch board, supplemented by the circular and other matter mailed with it, constituted an established lottery, which needed only a mailing designed to bring the opportunity to the public.

B. Defendant contended (Statement in Opp., p. 5) that the mailing merely solicited a purchase of merchandise by the addressee, the while affording the addressee a means of independently raffling off chances on part of the merchandise. But neither

the specific language nor the general purport of the material mailed, contemplated a purchase by the addressee; instead, it was plainly a solicitation that the addressee act as a seller of tickets for defendant's lottery of merchandise. Thus, it was a mailing to further the operation of a lottery established by defendant.

It is apparent at the outset that defendant's circulars were not intended for retailers or other persons whose business it is to buy and sell merchandise. The case is not, therefore, at all comparable to the so-called package deals sometimes offered retailers in which the addressee first buys the merchandise, *e.g.*, candy, together with the punch boards, and then himself seeks to raffle off the merchandise.[6] Here, the addressee was directed to "show the circular and card to your friends, relatives, neighbors, and co-workers" (*supra*, p. 5). To any ordinary addressee it would appear that what was offered to him, even urged upon him, was an "unusual opportunity" to sell chances on a radio and thereby be rewarded with a radio for himself. Had

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[6] For examples, see decisions in which such package deals were banned by the Federal Trade Commission as a violation under 15 U.S.C. 45. *Helen Ardelle, Inc.* v. *Federal Trade Commission*, 101 F. 2d 718 (C.A. 9); *Bunte Bros.* v. *Federal Trade Commission*, 104 F. 2d 996 (C.A. 7); *National Candy Co.* v. *Federal Trade Commission*, 104 F. 2d 999 (C.A. 7); *Ostler* v. *Federal Trade Commission*, 106 F. 2d 962 (C.A. 10); *Hill* v. *Federal Trade Commission*, 124 F. 2d 104 (C.A. 5); *Loughran* v. *Federal Trade Commission*, 143 F. 2d 431 (C.A. 8).

a prior purchase been contemplated here, it would not have been necessary for the mailing to urge the addressee to "show the circular * * *" (*supra*, p. 5), for the merchandise would already have been in the addressee's hands, and available for display. It can scarcely be denied that the punch board, coupled with the ticket seller's possession of the merchandise, would be a far better lure for the selling of chances.

Nor is the reasonable intent or effect of the mailing in accord with defendant's theory that the addressee establishes a lottery for which he becomes personally responsible and then buys merchandise from defendant to discharge the personal obligation. In the first place, the punch board bears a definite undertaking of what will be delivered to the winners. The ordinary addressee, not being a merchandiser, would not be in a position to guarantee such delivery and would not knowingly undertake a personal commitment to deliver a specific radio or camera upon the mere offer of defendant to sell him the merchandise afterward. Nor would the ordinary purchaser of even these small tickets on a radio or camera assume that he was relying on the addressee except as salesman for a company able to make the prize available upon completion of the lottery. Defendant was apparently well aware that if an addressee were given any understanding or indication that he was being solicited to undertake a personal responsibility of the type now described by defendant, his readiness

to accept would be diminished if not completely eliminated. But if, as here, an individual were asked only to be a salesman for a raffle conducted by an apparently responsible company, he would, in addition to other inducements, be likely to believe that the lottery was legal and that the whole transaction had the sanction of admissibility to the mails.[7] These are cogent reasons why defendant did not frankly establish the relationship of buyer and seller, but chose, instead, to solicit the addressee to function as salesman of tickets.

The circular employed language designed to give an ordinary reader the understanding that he was undertaking only the limited function and responsibility of a seller of chances, and we submit that a different relationship cannot now be properly urged upon the basis of a few equivocal words. De-

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[7] The importance of this aspect of implied sanction by use of the United States mails was apparent even in the more limited schemes of twenty years ago in which the instigator generally retained less of an interest in the transaction than is true in defendant's scheme. Thus, in the same hearing of the Subcommittee relied upon by defendant and the judge below (R. 25-26), the chief of police of Kansas City, Mo., wrote: "There is continually something new being put out in the way of devices that shall be 'within the law,' or at least advertised so as to give that impression to the prospective purchaser or operator. This office has many inquiries from prospective buyers of such devices as to whether they will be permitted to put them out without being molested by the police. Invariably the device advertised is some sort of a game of chance." Hearing, Subcommittee of Senate Committee on Post Offices and Post Roads, 72d Cong., 1st sess., on S. 182, April 21, 1932, p. 3.

fendant strongly emphasized that the radio to be retained by the addressee was to be a "gift."[8] Although the word "gift" is sometimes used to indicate a small premium given with a true purchase, it scarcely can indicate a mere premium where as here the "gift" is of a value as great as, or greater than, that of the article allegedly purchased. In the context in which the defendant used it, the word "gift" was likely to be understood as a euphemism for the reward or payment for a service. The "gift" offer was, of course, wholly inconsistent with a transaction contemplating actual purchase of two radios.

Similarly incompatible with any actual purchase of two radios is the reference to only one radio where the circular refers to acquisition of ownership by the addressee, as in the word "your" in the phrase "How to send for your Radio!" (*supra*, p. 5). Reference is made to two radios and the three pens only in a phrase devoid of any hint that the addressee is buying them ("[W]e will rush to you Two (2) * * * RADIOS and THREE * * * Pens." *supra*, p. 5), or in the order form which speaks only in terms of shipment and contains no language indicating transfer of title to anything other than the gift merchandise (*supra*,

[8] Only in the circular concerning the camera lottery did defendant employ the more qualified phrase "practically as a gift," sometimes found in other circularizations of this type, and in that circular it was employed only once and not in the heading (R. 14).

pp. 7-8). By means of such language and phrasing any ordinary addressee would be led to interpret the offer as a solicitation to sell the chances on behalf of defendant, the addressee to be recompensed with one radio and to have no relationship to the remainder of the merchandise other than to make delivery thereof to the winners.[9]

There was no such implausibility in the transaction as would warn an ordinary addressee that the offer, conveyed in apt language, was anything but what it seemed to be, *i.e.*, a plain solicitation to sell chances on a raffle. A large merchandiser could safely appoint an addressee as a salesman, for there would be little risk of possible liability on the part of the defendant if any addressee absconded with cash or merchandise. The addressee would ordinarily be dealing with his own circle of friends and would scarcely imperil his status for

[9] This understanding would not be dissipated by the meaningless language on the back of the punch board: "This card is given to you absolutely free. You can use as sales card if you wish. It can be used with any merchandise" (*supra*, p. 7). Obviously the punch board could not be used for "any merchandise" since it was practically covered with pictures of the prizes specified by defendant, and to use it for other merchandise would entail such striking out of pictures and language or such pasting over as would make that use impractical, since it would be suspect with most buyers of chances. Similarly, the ordinary reader, seeing the words, "If you desire to purchase merchandise from us you can do so at any time" (*supra*, p. 7) would scarcely relate this invitation to the punch board transaction, for the literature of that transaction does not otherwise use the word "purchase" in the entirety of the mailing.

so small an amount. Moreover, the amount paid by any one buyer of a chance would normally be too small to result in legal proceedings, especially with the buyer confronted by the normal obstacles of distance and expense and the possible defense of illegality in the entire transaction.

In the leading case of *Horner* v. *United States*, 147 U. S. 449, 463, this Court referred with approval to the early decison in *Commonwealth* v. *Sheriff*, 10 Phila. Rep. 203, for its statement that a lottery would be recognized as such "no matter how ingeniously the object of it might be concealed." The same may be said of a solicitation to sell tickets for a lottery. In the case cited by this Court, the accused had posted signs about his establishment reading "No Lottery." The signs were held to accentuate rather than to negate the real purpose and effect. The same is true of the strange circumlocutions, omissions, and evasions now relied upon by defendant to transform his solicitation into a simple sale of merchandise. It is beyond cavil that defendant's relation to the transaction was intended to carry through the sale of the lottery tickets, for he did not contemplate delivering his merchandise or receiving his money until the chances had been sold by his agent, and the amount he was to receive was the exact amount which the sale of the tickets would produce. Thus, at the time of the mailing, defendant's actual intent was coextensive with the operation of the lottery.

We submit that a proper analysis of the mailings here involved leads unequivocally to the conclusion that they constituted a solicitation to the addressee to become defendant's agent for the purpose of selling tickets on a fully established lottery, and not a simple offer to sell merchandise.

II

A Mailing Which Solicits the Addressee to Sell Tickets on a Lottery Is a Mailing Concerning a Lottery.

The enactment here involved prohibits mailings "concerning" a lottery. This language comprehends an extremely broad coverage by reason of the intrinsic meaning of the word "concerning." The word "concerning" is defined as "pertaining to; regarding; having relation to; respecting; as regards." Merriam-Webster, New International Dictionary (1951 ed.). The word is to be contrasted with the limited coverage of other enactments in this field, such as that relating to transportation into the United States or in interstate commerce, which brings only a lottery ticket or "advertisement of, or list of the prizes drawn" within the prohibition.[10]

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[10] 18 U.S.C., Supp. IV, 1961:

"Whoever brings into the United States for the purpose of disposing of the same, or knowingly deposits with any express company or other common carrier for carriage, or carries in interstate or foreign commerce any paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any advertisement of, or list of the prizes drawn or awarded by means of, any such lottery, gift enterprise, or similar scheme;

This same broad coverage has, in substance, characterized the legislation since its first appearance in 1868.[11] We find nothing in the legislative history to raise the slightest question as to the intent to prohibit a solicitation to sell tickets. The early decisions of the lower Federal courts which considered the scope of the word "concerning" as used in the legislation recognized an extremely broad coverage. *United States* v. *Noelke*, 1 Fed. 426 (C.C. S.D. N.Y. 1880); *United States* v. *Zeisler*, 30 Fed. 499 (C.C. N.D. Ill. 1887); *United States* v. *Fulkerson*, 74 Fed. 631 (S.D. Cal. 1896). There was discussion of a probable exception, as for example, if a father were to write to his son warning him against a lottery. Such a letter would be literally "concerning" a lottery but would manifestly be outside the purposes of the Act. *United States* v. *Mason*, 22 Fed. 707 (C.C. E.D. Va. 1884). The very mention of the exception, however, points out the broad coverage given the word "concerning." We submit that a mailing literally concerning a lottery can be deemed with-

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or knowingly takes or receives any such paper, certificate, instrument, advertisement, or list so brought, deposited, or transported, shall be fined not more than $1,000 or imprisoned not more than two years, or both."

[11] The Act of July 27, 1868, Sec. 13 (15 Stat. 194, 196) provided "That it shall not be lawful to deposit in a post-office, to be sent by mail, any letters or circulars concerning lotteries, so-called gift concerts, or other similar enterprises offering prizes of any kind on any pretext whatever."

out the scope of the statute only if it is clear that the mailing does not or will not propagate or further a lottery.[12] The present case does not pose a borderline situation, for the only ground urged here for an exception from the broad coverage is that the lottery, already initiated, had not reached the stage where salespersons had been designated to sell tickets. Plainly, with the mailing of the circular here involved the defendant's scheme was no longer a mere plan lying dormant in defendant's desk drawer. A mailing which solicits persons to sell lottery tickets is manifestly in furtherance of the lottery, and we believe that conclusion is implicit in the necessary effect of the decisions.

In *Horner* v. *United States,* 147 U. S. 449, this Court, after expressly sustaining the wide coverage of the legislation with respect to the type of lotteries within its purview, impliedly gave its approval to the broad scope of the language "concerning a lottery" which had been indicated in

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[12] This criterion seemed to be the true foundation, as well, for early decisions requiring that the mailing be that of the propagator of the lottery, rather than that of the victim. *Commerford* v. *Thompson,* 1 Fed. 417 (C.C.D. Ky.); *United States* v. *Mason,* 22 Fed. 707 (C.C.E.D. Va.). Of course, it might have been held, we think with better reason, that the use of the mails by the victims was also such a furtherance of lotteries as would bring it within the statute, but the Congress promptly eliminated the necessity for a test of the matter by specifically banning the sending of payment for purchase of a ticket through the mails. Act of Sept. 19, 1890, c. 908, 26 Stat. 465. The same enactment eliminated questions as to whether the tickets could be called a letter or circular.

United States v. *Zeisler, supra.* In the *Horner* case the circular stated the results of a drawing of redemption numbers for certain Austrian bonds and announced the date of the next drawing. Among other questions certified to this Court was the specific question whether the circular was one concerning a lottery (p. 455), and the question was answered in the affirmative (p. 467). While no attempt was made in that case to claim that a circular soliciting the addressee to sell bonds would be on a different basis from a solicitation made directly to a buyer of the bonds, this Court quoted language from the *Zeisler* case which treated both solicitations alike (147 U. S. 449, 460): " 'The circular sent through the mail was intended to induce persons to purchase *and deal in these bonds* with the hope of becoming the lucky winners * * *' " (italics supplied). There is thus no basis to assume that a solicitation is innocuous unless it asks the addressee to buy a ticket; the propagation of gambling is advanced as much if not more by obtaining a seller or dealer for the tickets.

There is obviously no ground for the contention that a solicitation to sell tickets is any the less a circular concerning a lottery because the addressee may decide not to heed the solicitation. The same possibility exists in the case of a solicitation to buy tickets, yet it could scarcely be contended that a circular offering lottery tickets would not be one

"concerning" a lottery merely because the scheme might fail for lack of buyers.

The cases cited by defendant and the court below (Statement in Opp., pp. 2, 3; R. 22-23) for their language to the effect that the lottery must be in existence at the time of the alleged violation are not apposite. In *France* v. *United States*, 164 U. S. 676,[13] the drawing involved had been completed when the interstate transportation of "hit-slips" and official result sheets took place, and this Court was called upon to construe the language "ticket, chance, share or interest in or dependent upon the event of a lottery" appearing in the different statute there involved. The Court held that that statute, which did not contain any such language as "concerning any lottery," looked to the future, and that since the drawing had been completed when the transportation took place there had been no violation because the lottery was then no longer in existence. The decision in that case rested entirely on the restrictive language of the particular statute there construed. In *United States* v. *Irvine*, 156 Fed. 376 (D. Ore.), neither the indictment nor the circular involved showed the existence of a lottery, and the court merely held that where the circular mailed does not show the

[13] When this case was cited by the Post Office Department (see R. 25), the Department was not speaking of such a case as that presented here. See *infra*, pp. 29-31.

existence of a lottery, such existence must be alleged in the indictment.[14]

In neither of the above-cited cases was it held or intimated that a lottery is not in existence *before* the first ticket is sold. In fact, in the *Irvine* case, the court relied on language quoted from another case indicating that the requirements of the statute would be met by an indictment charging an "*intention to hold some lottery* or drawing for prizes, to which the circulars must relate" (italics supplied; R. 23). We submit that a solicitation by the instigator of a lottery designed to induce another person to become his agent in selling the lottery tickets, which have already been prepared and which accompany the solicitation, implies the existence of a lottery. Such action by the instigator necessarily reflects full knowledge and understanding on his part that a lottery has been launched. Manifestly, then, the existence of a lottery is as implicit in the soliciting of an agent to sell fully prepared lottery tickets as it is in an offer to sell those tickets directly to a prospective purchaser. It is no answer to say that the addressee of the agency proposal may not accept, for a solicited purchaser may likewise decline to buy. It is but ingenious to

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[14] In *Francis* v. *United States*, 188 U. S. 375, also cited by defendant, the question of the existence of the lottery was not considered. There, this Court merely held that a duplicate of the purchaser's slip, which had been retained by the agent, did not purport, within the purview of the pertinent statute, to "represent" the purchaser's interest in a lottery.

argue that the existence of a lottery depends solely upon the action and intent of an agent, and not upon the purpose and manipulations of the person who has conceived and brought into being the reprehensible scheme. The purpose of the statute here involved would be largely defeated if every instigator of a lottery might with impunity mail any number of circulars and tickets so long as the mailings would take place in advance of the time set for the sale of the tickets.

In *Boasberg* v. *United States*, 60 F. 2d 185 (C.A. 5), the court upheld a conviction in a situation where the drawings were not to commence until a time in the future. There the circular apparently contemplated that the lottery would be physically conducted by the sender of the circular and not through distant agents. The court below in attempting to avoid the Government's argument that the lottery need not be in present operation in order to bring the circular within the statute, pointed out that the *Boasberg* opinion did not discuss the question. The court then sought to distinguish the *Boasberg* case from the case at bar on the fact that Boasberg intended "to personally operate" the scheme, while in the case at bar, the defendant "could at best only hope that the punch boards would be used as he desired" (R. 23-24). The purported distinction suggested by the court below ignores the undeniable fact that the offer of the prizes here was fully outstanding in the circular mailed, and was accompanied by the tickets or

chances which had previously been prepared and made ready for disposal to purchasers. To subject the statute to an exception simply because all of the details of furthering the lottery are not intended to be "personally" carried on by the instigator, or because such details have not been completed, would reduce the operating ambit of the statute to such a narrow area as to render it largely ineffective to carry out the Congressional purpose. Few instigators of lotteries would be lacking in ability to show that events outside of their "personal" control might defer or prevent the completion of the lottery. The "personal" factor indicated by the court below is novel to the statute, and is plainly inconsistent with its broad purpose, *i.e.*, that the United States mails shall not be employed as a means to further or to conduct any form of lottery.[15]

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[15] The considerable reliance placed below (R. 24-25) upon *Stockton* v. *United States*, 205 Fed. 462 (C.A. 7), is, we submit, even less justified. That case actually turned upon the particular legislative history of the different statute there involved (now 18 U.S.C., Supp. IV, 1341), which prohibited a mailing "for the purpose of executing" a scheme to defraud devised by the accused. The accused had issued a catalogue advertising marked cards and loaded dice, on an outright sale basis and without contemplation of further participation either in furnishing the prizes, or otherwise. The court relied *inter alia* upon the fact that the statute had, at an earlier time, been amended specifically to prohibit the sale of certain specified articles susceptible of fraudulent use, e.g., counterfeit money; therefore, sales of articles not thus specified were apparently not to be held *per se* the devising of a scheme to defraud and the "executing" thereof by mailing (p. 468).

III

The Earlier Requests of the Post Office Department for More Readily Enforceable Legislation Do Not Constitute an Administrative Sanction of Mailings of the Type Here Involved Nor Can Such Sanction Be Derived From the Department's Past Enforcement History

The court below relied in part upon the fact that the Post Office Department had for a time made efforts to obtain more readily enforceable legislation, and assumed that such proposed legislation indicated an interpretation of the Department that the present legislation was inapplicable to "such mailing as that now in question" (R. 25). We submit that such an assumption is unwarranted. The Department, for a period of time, more than 19 years ago, sought legislation barring from the mails "any article, device, or thing designed or intended for the conduct of a lottery, gift enterprise or scheme" or any communication concerning it, but the doubts as to whether the then existing statute applied to punch boards seem to have been limited to the case of the punch board manufacturer whose participation went no farther and lasted no longer than the outright sale of the punch boards or, at most, to the outright and completed sale of the boards and prizes.[16] We find no refer-

[16] Thus, Senator Ramseyer, a Subcommittee Chairman, stated, in 1921: "[I]n order better to enforce the law against the lottery enterprises it is proposed to bring in the persons, companies, and corporations that are engaged in manufacturing these schemes, like punch boards, raffle boards, and other things along that line * * *". 61 Cong. Rec. 6283. And see 61 Cong. Rec. 6284, 6285, 6288.

ence whatsoever to such extensive participation as is involved where the accused offers the use of a punch board and receives payment for the prizes only after funds have been obtained through the operation of that punch board. We find no instance where reference was made by the Post Office Department to any circular or order form, such as those involved here, plainly indicating a continuing interest of the seller after the punch board has been received by the addressee. Punch boards were exhibited as examples, but not sets of circulars as in the integrated scheme here involved.

Indeed, there are clear indications that no doubt was entertained as to the application of the existing statute where the person claiming to be only a seller had any connection beyond mere sale. The Solicitor of the Post Office Department in a 1928 opinion to the effect that punch boards were mailable added the specific *caveat,* "when offered for mailing by manufacturers *if they are not connected with the use made of the boards by the retailer*" (italics supplied). 7 Op. Solicitor Post Office Dept. 655, 656. And in testimony before a Senate Subcommittee in 1926, Horace J. Donnelly, the then Solicitor, stated: "If the merchandise was sent separately I would say it would not be included in the present or proposed statute * * * *unless there was sent along with the merchandise such matter as would show clearly that it was intended for the conduct of lotteries*" (italics supplied).

Hearings, Subcommittee of the House Committee on Post Offices and Post Roads on H. R. 6982, 69th Cong., 1st sess., p. 7, February 18, 1926.[17]

The efforts of the Post Office Department in the years preceding 1932 to have the statute amended were directed primarily to cases where the manufacturer sold paraphernalia without a retention of interest or connection after the sale. The program of the Department indicated no interpretation that the then existing statute would be considered inapplicable, even in the case of an outright sale, where payment was to be made for the paraphernalia from the proceeds of the sale of chances on the punch board.

Defendant can derive little support from the alleged lack of enforcement for the construction placed on the statute by the court below. We are not advised as to the magnitude of the mailings in

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[17] Where doubts were raised, in hearings, as to the application of the existing statute in the cases of combined sales of punch boards and prizes, there seemed to be contemplated a simultaneous transaction involving shipment of punch board and prizes. No suggestion was raised concerning a purchase of prizes after the proceeds of the punch board had been obtained. The phrases employed in the hearings indicate a simultaneous shipment, *e.g.*, "These cards or boards have attached thereto concealed numbers or names, some of which * * * entitle * * * to certain prizes *displayed with the card or board.* [Italics supplied.] (Hearing, Senate Committee on Post Offices and Post Roads on S. 2751, 70th Cong., 1st sess., p. 2, March 27, 1928); "a complete lottery device, the board and the articles to be awarded by means of the drawing" (*op. cit.*, p. 4).

the years prior to 1932, which contained solicitations to sell lottery tickets as distinguished from direct solicitation to buy such tickets, and it is not clear that the practice was so persistent as to call for an unyielding program of enforcement. However, defendant himself cites the unreported case of *United States* v. *Bundy and Gordon*, No. 10098, decided October 4, 1938 (S.D. Ala.) involving an effort of the Post Office Department to enforce the statute in a punch board case as long ago as that year (Statement in Opp., pp. 3-4), and refers pointedly to the failure of the Government to appeal from the adverse decision of the District Court in that case. The failure of the Government to appeal a given case may, of course, rest on any number of factual and procedural factors entirely apart from questions concerning the construction of the pertinent statute.[18] Thus, the lack of reported cases showing persistent efforts to enforce a penal statute in the type of case presented is not, without more, indicative of a contrary interpretation; nor is the failure to appeal from an adverse unreported decision an acquiescence in the construction implicit in the decision, or the abandonment of a contrary view of the statute.

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[18] For example, in the *Bundy and Gordon* case, the District Court stated no grounds for its action in sustaining the demurrer to the indictment, and a serious question of appealability under the Criminal Appeals Act would have been presented had an appeal been taken.

In any event, defendant was not entitled to act upon the basis of the administrative interpretation he now ascribes to the Post Office Department, for the Department had clearly announced its stand before the mailings here in question. In January, 1948, it was clearly stated that a person is deemed to be conducting a lottery where he "is sending through the mails punch boards to be used by addressees for the purpose of conducting a lottery, as a way of raising funds to purchase the lottery prize from the sender."[19]

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[19] "INSTRUCTION OF THE SOLICITOR—LOTTERIES, GIFT ENTERPRISES, OR SCHEMES FOR THE DISTRIBUTION OF MONEY OR PROPERTY BY LOT, CHANCE, OR DRAWING

"All personnel of the Post Office Department and the public should carefully note the following with regard to the present policy of the Office of the Solicitor in making recommendations under section 259 of title 39, United States Code (sec. 604, P. L. & R., 1940).

"The above-mentioned section of the United States Code specifies that the Postmaster General may upon evidence satisfactory to him that any person or company is engaged in conducting 'any lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property, by lot, chance, or drawing of any kind,' instruct postmasters at any post office to return to senders all mail received at his office addressed to the person or company conducting such lottery, gift enterprise, or scheme with the word 'Fraudulent' plainly written or stamped on the outside thereof. In the future, when evidence is received showing that a person or company is sending through the mails punch boards to be used by addressees for the purpose of conducting a lottery, as a way of raising funds to purchase the lottery prize from the sender, the above-mentioned statute will be considered to have been violated on the ground that such person or com-

In view of the extensive respects in which the administrative history supports the Government's construction of the enactment, it is unnecessary to

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pany is engaged in conducting a 'scheme for the distribution of money, or of any real or personal property, by lot, chance, or drawing of any kind.'

"'All postmasters are instructed to give due publicity to the above policy concerning punch boards.'' [The Postal Bulletin, Vol. LXIX, No. 19,100, p. 2, January 28, 1948.]

"INSTRUCTION OF THE SOLICITOR—LOTTERIES, GIFT ENTERPRISES, OR SCHEMES FOR THE DISTRIBUTION OF MONEY OR PROPERTY BY LOT, CHANCE, OR DRAWING

"Supplemental Instruction

"Supplementing the information contained in notice which appeared in the Postal Bulletin of January 27, 1948, relative to the mailing of punchboards by parties who offer to furnish prizes to be paid for with funds raised in the sale of chances on the board:

"When mailings are received by a postmaster, he is not to treat them as nonmailable under section 601 or 604, Postal Laws and Regulations, 1940. He should dispatch or deliver the mailings, full responsibility to rest with the senders for any violation of law involved. The postmaster, if located at the office where the matter is originally mailed, should, when possible, secure from the senders a sample of the mailing and forward same to the Solicitor. The latter should also be furnished a statement of the number of pieces offered for mailing at that point.

"It should be pointed out that matter relating to a 'scheme for the distribution of money, or any real or personal property, by lot, chance, or drawing of any kind' is to be marked 'Fraudulent' and returned to senders only after an order is issued by the Postmaster General under section 604 'upon evidence satisfactory to him' that the parties involved are conducting such a scheme." [The Postal Bulletin, Vol. LXIX, No. 19,105, p. 3, February 12, 1948.]

dwell upon the limited force of defendant's argument based on the presumed administrative construction. Even if defendant had been able to establish an interpretation of the Post Office Department relating to such a case as that here posed, neither such an interpretation nor the failure of Congress to amend the statute could be deemed to overcome the extreme breadth of language of this enactment and the plain mandate of its purpose. See *Ex parte Collett*, 337 U. S. 55, 61; *United States* v. *Girouard*, 328 U. S. 61, 69-70; *Estate of Sanford* v. *Commissioner*, 308 U. S. 39, 52-53.

IV

Even If It Were Assumed Arguendo That Defendant's Circular Actually Constituted an Offer to Sell the Punch Board and Prizes, the Circular Would Be a Circular "Concerning" a Lottery, in Violation of the Statute.

While we think there can be no doubt, as pointed out *supra*, pp. 14-21, that the circular here involved was a solicitation to the addressee to enter into the relationship of a seller of tickets for a fully established lottery of defendant's merchandise, we submit that the case may be properly decided upon the broader construction that the statute prohibits the mailing of a circular offering lottery paraphernalia upon an outright sale basis. And we do not believe that such construction need be conditioned, as it was conditioned in the earlier discussions of representatives of the Post Office Department,

upon the retention of some further connection by the seller. We submit that the application of the law is to be stated, not in terms of whether an interest is retained by the seller, or whether the lottery is in operation or is prospective only, but rather upon the basis of whether the item mailed to which the circular relates is an item so dedicated to the operation of a lottery as to bring the lottery into existence. A punch board, containing only numbers, without more, may truly be a novelty item for use as a mere game at parties. But if it bears on its face a specification of a consideration to be paid for a chance and a specification of prizes to be awarded defendant upon chance, it is a means of conducting a lottery and is therefore in furtherance of one, irrespective of ingenious language shown in small print on the back of the board to the effect that the buyer of a chance can choose not to pay, and irrespective of the patently remote possibility that the board may be used as a game without payment of any consideration.

The basis for the foregoing position is that the language of the statute here involved is unconditioned, and the evil against which it is directed is propagated as truly by the person who takes the early, promotional steps in furtherance of a lottery as by the person who performs an act later in the reprehensible chain, perhaps a mere ministerial act of limited consequence. We find nothing in the legislative history of the statute to indicate that a circular, the purpose of which is to further

the operation of a lottery, is outside the contemplated scope of the broad words "concerning any lottery," especially when the circular is accompanied by the means of conducting the lottery itself. The requirement of present existence of the lottery has been enunciated by this Court only with respect to a basically different enactment and for reasons not applicable here. As pointed out *supra*, p. 25, the decision in *France* v. *United States*, 164 U. S. 676, related to a completed lottery and not to a prospective lottery. Furthermore, the enactment there involved contained no broad prohibition of mailings "concerning" a lottery but applied only to items representing lottery tickets and to advertisements of a lottery. See 164 U. S. 677-678, footnote 1. Reasonably, the designation of "ticket" could not be applied to "hit-slips" or result sheets which merely recorded winning combinations and the sequence of the numbers drawn, and which did not purport to be the purchasers' evidence of rights. A basically different concept is also involved in the statute which covers mailings in execution of fraudulent schemes. There, as pointed out, *supra*, p. 28, footnote 15, the legislative history of the statute has been considered to narrow the coverage. Since mailings concerning specific fraudulent devices were expressly prohibited by an amendment of the statute, it was deemed that the mailing of a catalogue of devices not so expressly

prohibited could not properly be held *per se* a mailing designed to execute a fraudulent scheme.

The narrower scope of the statutes underlying the cases cited by the defendant and the court below but emphasizes the broad purview of the statute here involved, leaving no just doubt that under it the mails of the United States are barred to all mailings which have for their purpose the furtherance or conduct of a lottery. In this instance, Congress has commanded broadly that the United States mails shall have no part in either the promotion or the operation of lotteries or similar schemes offering prizes dependent on chance. Those purposes will be circumvented in large part if the governmental authorities must wait until lotteries are flourishing before they may take action to enforce the statute.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the judgment dismissing the indictment in this case should be reversed.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 91

THE UNITED STATES OF AMERICA,
Appellant,

vs.

PERRY HALSETH

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

No. 211 CRIMINAL T

UNITED STATES OF AMERICA

vs.

PERRY HALSETH

STATEMENT OPPOSING JURISDICTION AND MOTION TO AFFIRM OR DISMISS

Pursuant to Rule 12, paragraph 2 of the Rules of the Supreme Court of the United States, the appellant, the United States, on May 2, 1951 filed a notice of appeal to the Supreme Court of the United States from the order of the District Court dismissing the indictment herein, and on May 3, 1951 served the appellee, Perry Halseth, with a copy of the appellant's statement as to jurisdiction of the Supreme Court in the above entitled cause.

The appellee hereby asserts that the appellant has stated no substantial matters or grounds making for the jurisdiction of this court. Its appeal serves only as a profitless inroad upon the time of the court. The unsubstantial character of the questions raised by the appellant is so apparent on the face of the record that the court is warranted in

summarily disposing of the appeal at this stage of the proceedings under Rule 12, paragraph 3.

Zucht v. *King*, 260 U. S. 174.

Included herein is appellee's motion to dismiss the appeal, or to affirm the judgment of the District Court on the ground that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

The unsubstantial character of the appeal is evident because:

I

The Judgment of the District Court Is Clearly in Line With All Applicable Prior Federal Court Decisions

The government in its jurisdictional statement has raised a general question which is not in issue here. Appellant's statement completely fails to recognize that the principal and sole issue here involved is one of substantive law; namely, whether the statute (Section 213 of the Criminal Code; now 18 U.S.C. 1302) embraces the mailing of material which in the hands of the recipient might be used for the purpose of setting up and operating a lottery or similar scheme.

The appellee, Perry Halseth, asserts and the District Court correctly held that no offense is committed unless a lottery has been set up and put in operation by the person charged either at the time of mailing or at the time of receipt of the mail matter. The judgment of the District Court is in line with all applicable prior federal court decisions.

An indictment under this section must aver, either specifically or by necessary intendment, the existence of a lottery or gift enterprise, since the existence must be proven to establish the offense.

United States v. *Irvine*, 156 Fed. 376.

The Supreme Court of the United States has held that a slip of paper retained by the agent of a lottery which is the duplicate of a slip retained by the purchaser indicating the numbers selected by him, is not a paper, certificate or interest purporting to be or to represent chances, shares and interest in the prizes thereafter to be awarded by lot in the drawing of a lottery. Consequently, the interstate transportation of such duplicate slips is not a violation of Section 387, Title 18, U.S.C. (now Section 1301), since at the time of such transportation in interstate commerce no lottery was in *existence* and would not be unless and until the slips were received at the lottery office with the player's money.

Francis v. *United States,* 188 U.S. 375.

The interstate lottery transportation statute involved in the Francis case is a companion statute to the one in the instant case, as then amended in 1895, both being sections of the so-called anti-lottery legislation constituting the Act of March 2, 1895, Chapter 191, 28 Stat. 963.

In an earlier case the Supreme Court of the United States in *France* v. *United States,* 164 U.S. 676, held that there was no violation of the Interstate Lottery Transportation Statute because "hit slips" and official result sheets carried by messengers of a lottery from one state to another with the "pay-off" money were not then dependent upon the event of any lottery; they merely related to the results of a lottery already drawn and completed.

Only one case under the instant statute directly involving use of the mails in sending of punch boards as advertising material, so far as counsel has been able to ascertain, has reached the Federal courts. In 1938 an indictment was returned under Section 336, Title 18 U.S.C. in the District Court of the United States for the Southern Division of

the Northern District of Alabama wherein R. C. Bundy and William H. Gordon were charged by the Grand Jury with mailing material almost identical with the material involved in this case in violation of the instant statute. On October 4, 1938, the Honorable T. A. Murphree, District Judge, in *United States* v. *Bundy and Gordon*, No. 10098, by order entered that day, sustained the defendants' demurrer to the indictment. The Government did not appeal.

The Bundy case is not reported in the Federal Supplement, but counsel is prepared to furnish the Court with a certified copy of the record consisting of the indictment, demurrer and order dismissing the indictment, if requested.

It has been held with respect to the companion postal fraud statute, Section 338, Title 18 U.S.C., now Section 1341, that a scheme involving the sale by defendant of loaded dice, marked playing cards, etc., designed and intended to defraud persons induced to play with the buyers thereof, in which the mails were used for conveying a printed catalog of such articles, was not within the section which makes it an offense to use the mails in the conduct of a scheme to defraud, since the *scheme* to defraud third persons, if any, would be devised and perpetrated by the buyers of the apparatus when they used same, in which defendant had no part.

Stockton v. *United States*, 205 Fed. 462 (C.A. 7)

In this case the Court said in part (p. 464):

> "We start, as we must, with the concession that, although marked cards and loaded dice may be used, as stated, they are nonetheless lawful subjects of commerce. They may be manufactured, sold, and purchased. If, therefore, upon purchase and sale, the parties thereto understand precisely the subject-matter and the seller proposes to and does give to the purchaser just what the latter wants—even though it be gambling apparatus—the transaction is an ordinary contract. The

> seller has neither *devised* nor executed a *scheme* or *artifice*. But the government, to sustain the indictment and conviction in the present case, seeks to impute or ascribe to the plaintiff in error the fraudulent intent of the purchaser or possessor of the gambling devices, and thereby charge a fraudulent scheme."

By analogy, the instant case is within the four corners of Judge Geiger's opinion in the Stockton case, since there is a definite hiatus between the defendant and any persons who might punch out the card and pay their money to the operator thereof in the hope of winning a prize offered *by the operator*. It is clear that the defendant here is offering no prizes of any sort for a consideration to anyone based upon lot or chance, but is simply offering to sell certain articles of merchandise.

II

The Statute Is Criminal and Must Be Strictly Construed

The Section under which the government seeks to convict the defendant is criminal and must be strictly construed.

Post Publishing Co. v. *Murray*, 230 Fed. 773 (C.A. 1) (cert. denied 241 U.S. 675);
France v. *United States*, 164 U.S. 676 and 682.

The language of the statute now in question, under the rule of strict construction, cannot be stretched to encompass ideas or thoughts respecting the future possibility of setting up a lottery or a scheme for the distribution of prizes by lot or chance. As the Supreme Court said in the *France* case: (p. 683)

> "If it be urged that the act of these plaintiffs in error is within the reason of the statute, the answer must be that it is so far outside of its language that to include it within the statute would be to legislate and not to construe legislation."

It is well settled that when a rule of conduct is laid down in words that evoke in the common mind a fixed picture, the statute should not be extended simply because it may seem, to a prosecutor or a court, that another policy might apply, or upon the speculation that if the legislator had thought of it at the time of enactment, broader words would have been used.

McBoyle v. *United States*, 283 U.S. 25, (citing *United States* v. *Thind*, 261 U.S. 204, 209).

III

The Judgment Below Is in Line With the Applicable Attorney General's Opinion

The Attorney General of the United States has ruled with respect to the instant statute, that a company which sends out paraphernalia and information as to how a drawing may be conducted in the future *by the recipient* of the device is not engaged in conducting a lottery and is not offering prizes dependent upon lot or chance.

This opinion was based upon the mailing of catalogs offering gambling devices for sale. In the instant case this opinion is even more persuasive in that defendant does not even offer a punch card for sale through the mails.

22 Opinions Attorney General of the United States 198.

IV

The Facts as Stipulated Disclose No Violation

The exhibits which are a part of the record on this appeal and which disclose the complete mailing involved in the instant case, conclusively show that the advertising material upon which the charge is based is not material which

relates to or concerns "a lottery or similar scheme" for the distribution of prizes by lot or chance within the meaning of the statute. The material constitutes a solicitation of orders for certain items of merchandise, at a fixed and specified price. It is a mail order business. The so-called "punch cards" (Exhibits R-2 and C-2) are pieces of cardboard, containing certain descriptive matter which have no relation whatsoever to any lottery or prize scheme existing either at the time of mailing by the defendant or at the time of receipt by the persons named in the indictment.

Neither the indictment nor the exhibits disclose that any lottery or prize scheme was in operation or existence at the time of the mailing, or at the time of receipt. It is likewise obvious that such an enterprise may never be inaugurated, set up or put in operation by anyone through the use of such a card. If such card should be set up in the future, and be used to conduct a lottery or similar scheme for the distribution of a prize by lot or chance (assuming, but not conceding, that the operation of a punch board answers that description), such operation would be outside of the United States mails, in a local jurisdiction, conducted by parties other than the defendant, the defendant taking no part in and having no connection with such operation.

The sole responsibility for setting up and operating a lottery, if any, lies with the person who puts the card to such use. This can only be done by his inviting another person to punch out a name, accepting in return the amount called for on the slip punched out. In no instance did the defendant invite the addressee to punch out a name and remit the price called for by the punch. Neither the defendant nor Perry Sales Company ever offered any prize to anyone for punching out the cards. The addressee was an independent

actor under no obligation to buy defendant's merchandise for use as a prize or otherwise.

The most that can be said is that a punch card mailed by defendant is a device or a piece of paraphernalia which, like a deck of playing cards, or a pair of dice, can be used in determining the winner of a prize by lot or chance for a consideration. Also like a deck of cards, it can be used as the instrumentality in determining the winner of a prize in a game where no consideration (and therefor no lottery) is present.

If construed to cover defendant's acts then the mailing of a letter to a manufacturer or printer of punch cards or playing cards or any other type of device which could be used to determine the winner of a prize by lot or chance, requesting prices or ordering such paraphernalia, would constitute a violation of the statute, even though no actual drawing or lottery or game of chance ever resulted. The overwhelming weight of authority supports the proposition (and there is no authority known by counsel to the contrary) that there can be no scheme for the distribution of prizes by lot or chance unless and until the idea is put in motion by the setting up of an offer of a prize based upon payment and acceptance of a consideration, with the winner of the prize to be determined by lot or chance. To constitute a lottery the three elements (1) prize, (2) consideration, and (3) chance, must *all* be present.

Horner v. *United States*, 147 U.S. 449.

Thus, the mailing of material which at some future time might be or possibly could be used to operate a lottery or a game of chance is not proscribed by the statute. The basic reason for this is that the material itself does not constitute a lottery since no lottery is set up and in existence at the time of mailing.

V

The Postal Department, The Federal Agency Charged With the Administration of the Act Involved and Whose Operations Are Affected by It, Has Long Conceded the Interpretation Which Gave Rise to the Judgment Below.

Plans of businesses like the one herein involved have been in operation through the mails for more than 30 years and within the knowledge and without objection of the Post Office Department under the postal lottery statutes including the one under which the instant indictment is brought. Administratively the Post Office Department has jurisdiction over lotteries in the mails under Sections 259 and 732 of Title 39, U.S.C., which statutes are in *pari materia* with the criminal statute here involved. Likewise the instant statute under its previous form (Section 336) declared, inter alia, that material concerning lotteries or gift enterprises or similar schemes offering prizes dependent in whole or in part upon lot or chance shall not be deposited or carried in the mails or delivered by any postmaster or letter carrier. Therefore administratively the Post Office Department had the right and, if the mailing was illegal, it had the duty to refuse to accept any such material when offered for mailing.

The advertising material here involved was accepted for mailing by the Post Office at Chicago, Illinois, under third class mailing privilege (which gives the Postmaster the right to open and inspect) and was so carried through the mails, and delivered. Likewise under these companion statutes (39 U.S.C. 259 and 732) the Postmaster General, upon satisfactory evidence, has the power and authority to issue so-called "fraud orders" preventing the delivery of mail addressed to the operator of a lottery, and the pay-

ment of postal money orders, in cases where a lottery or similar scheme is being conducted through the mails. In 1947, a series of complaints was issued by the Post Office Department against mail-order houses using advertising material almost identical with that here involved, charging violation of such statutes (including the one here involved). After extensive hearings before the Solicitor of the Department, these cases were dismissed by that official.

> In re Monarch Sales Co., Huron Sales Co., et al. Before the Solicitor Post Office Department, F & L Dockets 15/371 and 15/374.

In the course of administration by the Post Office Department of the postal laws relating to lotteries in the mails, the Solicitor of that Department in 1928 stated in an opinion appearing in Volume VII, Opinions of the Solicitor of the Post Office Department, at page 656, as follows:

> "This office has ruled that it does not regard punch boards as unmailable under the postal lottery statutes when offered for mailing by manufacturers if they are not connected with the use made of the boards by the retailer. When, however, the boards are *set up* to conduct lotteries, all matter relating to the scheme is unmailable no matter by whom offered."

In other words, mailing such as involved in this case are not unmailable under the postal lottery statutes since they are not connected with the use made of the boards by the recipient. They are not presently *set up* to conduct a lottery and may never be so set up.

In the case of *United States* v. *Bundy, et al.*, referred to earlier, the issues and the statute are identical with the issues and the statute in the instant proceeding. The indictment in the *Bundy* case discloses that the same type of circular letter and the same type of punch card as

here involved, were mailed by the defendants. It is noteworthy that the Court's action in granting the motion to dismiss the indictment, being a final order, was appealable by the government. No appeal was taken. It is also significant that the government has made no other known attempt to interpret the law as it seeks in the instant case. It is even more persuasive that no reported decision supports any such position. The absence of reported decisions sustaining an alleged liability under a given set of facts raises a strong presumption that no such liability exists.

Western Union Telegraph Company v. *Schriver*, 141 Fed. 538 (C.A. 8); *Bank of Italy* v. *Bentley*, 20 Pac. (2d) 940.

By analogy, dicta in *United States* v. *Farrar*, 281 U.S. 624, might be said to apply with equal force to the instant case. The *Farrar* case involved construction of the prohibition act which made it a criminal offense to "purchase . . . any liquor without first obtaining a permit from the commissioner so to do . . .". The United States Supreme Court said: ". . . that during the entire life of the National Prohibition Act, a period of ten years, the executive departments charged with the administration and enforcement of the act have uniformly construed it as not including the purchaser in a case like the present. No prosecution until the present one has ever been undertaken upon a different theory and Congress, of course, well aware of the construction and practice, has significantly left the law in its original form."

These rulings, opinions and decisions of administrative officers of the government are overwhelmingly persuasive in the instant case, particularly when it is borne in mind that the instant statute must be strictly construed and is not open to the great liberality of interpretation which the government now contends for.

VI

The Congress of the United States Has Repeatedly Refused to Pass a Statute Incorporating the Precise Interpretation Contended for by Appellant Into the Law Here in Question.

The history of the statute in question, and the past enforcement thereof, inevitably leads to the conclusion that the statute does not and was never intended to proscribe the sending by mail of devices or paraphernalia which, at some future time in the hands of the recipient, might be used by him for the conduct of a lottery or scheme for the distribution of prizes by lot or chance. The statute was last amended in 1895, the amended statute becoming a part of the anti-lottery legislation under the Act of March 2, 1895. This included three sections relating to Federal regulation of lottery traffic, one involving use of the mails (the present statute), the second involving importations from abroad, and the third involving interstate carriage of lottery material (construed in the *Francis* and the *France* cases (*supra*)).

As early as 1915 the Government, through the Post Office Department, reported to Congress that the instant statute did not embrace the plan of operation charged in this indictment. Beginning that year, and possibly earlier, bills were introduced in Congress to amend the instant statute so as to make the operations charged in the indictment, unlawful thereunder. These bills were reintroduced year after year until 1932. Each time these bills were submitted to Congress, the Post Office Department recommended passage and at times suggested changes that might strengthen them. But none were ever enacted into law; there has been no amendment to the statute since 1895. (By the Act of

March 4, 1909, C. 321, 213, 35 Stat. 1129, the statute was incorporated without change in the 1910 U. S. Criminal Code, as Section 213).

The hearings before the subcommittees of the Committee on the Post Office and Post Roads of the House of Representatives and before the Committee on Post Offices and Post Roads of the United States Senate with respect to this proposed amended legislation as exemplified by the printed reports clearly established that the Government lacked jurisdiction under then existing law over mailings such as in the instant case. A portion of the record of one such hearing has been set forth in the opinion of the District Court (pp. 22 & 23 of appellant's statement).

The statute had always contained the language "letter, package, postal card or circular concerning", but it was the position of the Government that to secure control over mailings such as in the instant case, it would be necessary for the Congress to amend the instant section by making it an offense to deposit in the mails any "article, device or thing designed or intended for the conduct of such lottery enterprise or scheme or matter relating thereto." The annual reports of the Postmaster General for a number of years subsequent to 1915 include a reference to the fact that such an amendment had been recommended to Congress by the Post Office Department. After 1932 apparently such efforts were discontinued.

VII

The Opinion of the District Court Makes It Clear That the Interpretation of the Statute in Question Contended for by the Plaintiff-Appellant Is So Patently Wrong That the District Court Found It Unnecessary to Decide Many Other Questions Raised by the Defendant-Appellee, a Decision On Any or All of Which Might Well Have Led to the Same Result.

As pointed out in the opinion of the District Court (page 15 of appellant's statement), the appellee raised many serious constitutional questions as to the sufficiency and definiteness of the indictment when the matter was originally heard. A decision on any or all of these might well have led to the same result in the District Court. But it seemed so certain to the District Court that the statute did not proscribe the acts in question, that it deemed it unnecessary to decide these other important questions.

The question here has been considered by the courts, the Attorney General, the administrative agencies of the government and by the legislature ever since the statute was enacted and all support the defendant's contention that the plan of business here involved is not an offense as charged.

Motion to Dismiss or Affirm

WHEREFORE this appellee respectfully submits this statement showing that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument; and this appellee respectfully moves the court to dismiss this appeal, or in the alternative, to affirm the judgment entered below.

Dated May 18, 1951.

Respectfully submitted,

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By BRUNO V. BITKER,
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IN THE

Supreme Court of the United States

October Term, 1951

No. 91

UNITED STATES OF AMERICA, *Appellant*

v.

PERRY HALSETH, *Appellee*

On Appeal from the United States District Court
for the Eastern District of Wisconsin

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WILSON - EPES PRINTING CO. - RE 6003 - WASHINGTON 1, D. C.

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IN THE

Supreme Court of the United States

October Term, 1951

No. 91

UNITED STATES OF AMERICA, *Appellant*

v.

PERRY HALSETH, *Appellee*

On Appeal from the United States District Court for the Eastern District of Wisconsin

BRIEF FOR APPELLEE

Jurisdiction

Probable jurisdiction was noted by this Court on October 8, 1951 (R. 30). It is respectfully submitted that the order of the District Court dismissing the indictment is more in the nature of a decision that the indictment fails to state an offense, rather than a decision on the validity or construction of the statute.[1] The decision is

[1] In *United States* v. *Lem Hoy*, 330 U.S. 724, 725, cited by appellant, the dismissal of the information was grounded on the invalidity of the statute; this Court in addition to 18 U.S.C.A. 682 (now Section 3731) also citing 28 U.S.C.A. 345 (revised into present Section 1252, entitled "Direct Appeals from Decisions *Invalidating* Acts of Congress). See also, *United States* v. *Carter*, 231 U.S. 492; *United States* v. *Wayne Pump Co.*, 317 U.S. 200, 203; *United States* v. *Swift*, 318 U.S. 442, 445.

predicated upon stipulated facts (R. 5, 19). The appellant concedes (Brief, p. 3) that: "The District Court held that if the indictment had alleged the additional facts contained in the exhibits attached to the stipulation, it would not have charged an offense under the statute." The Government's entire case admittedly rests on such facts. Thus the order of dismissal has most of the characteristics of a directed verdict of not guilty on the Government's evidence, from which no appeal would lie. The court merely applied the admitted facts before it and, in effect, ruled that the indictment was defective because such facts were not sufficient to show or prove first, that the scheme alleged was in fact a lottery offering prizes dependent in whole or in part upon lot or chance, and therefore the circular letter complained of did not in fact "concern" a lottery. Cf. *United States v. MacDonald*, 65 F. Fed. 486, 488.

Additional Statement of the Case

Exhibits R-2 (R. 9) and C-2 (R. 15) are incomplete in that the reverse thereof is not reproduced in the record, although referred to in haec verba in the lower court's opinion (R. 21).[2]

The indictment (R. 1, 2, 3) fixes the time of the commission of the several alleged offenses as between March 27, 1948 and June 15, 1948. The indictment was filed May 9, 1949 (R. 1) and refers to "Former Section 336, Title 18 U. S. C., Now Section 1302, Title 18 U. S. C." The latter section became effective September 1, 1948.

The record fails to disclose that the envelopes, namely Exhibit R (R. 7) and Exhibit C (R. 13), containing the other exhibits, were mailed under third-class postal permit at Chicago, Illinois, and were unsealed to permit of

[2] Also set out in the Government's brief, pp. 6, 7.

postal inspection in conformity with postal rules and regulations pertaining to third-class mail matter.

The record fails to show that defendant, in addition to the grounds set forth in the motion to dismiss (R. 3, 4), raised the following additional objections[3] to the indictment:

> "7. The defendant is being prosecuted under a section of the United States Code which was not in effect at the time stated in the indictment.
>
> "8. The venue is improper, since the circular letter complained of was not mailed within the jurisdiction of the court, but was mailed at Chicago, Illinois.
>
> "9. The indictment does not comply with Rule 7 of the Federal Rules of Criminal Procedure, in that it was not signed by the Attorney for the Government but by an assistant in the office of the United States Attorney for this district." See (R. 3).

Summary of Argument

I

The statute must be strictly construed.

II

The statute was not designed or intended by Congress to apply to the mailing, or advertising by mail, of articles which might or could be used by the recipient to conduct a lottery.

III

There was no lottery in existence either at the time of mailing or at the time of receipt of the literature, and none of the literature complained of, therefore, is a "circular concerning any lottery . . . offering prizes de-

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[3] The lower court (R. 21) referred to this group of objections as resting on technical grounds, but did not pass upon same.

pendent in whole or in part upon lot or chance . . ." as alleged in the indictment. The circular in question is not employed as a means to further or conduct any form of lottery.

IV

There is no offer submitted to, or solicitation made of, the addressee to act as a salesman or agent of defendant in the distribution of lottery tickets.

ARGUMENT

I

The Statute Must Be Strictly Construed.

The statute under which the Government seeks to convict defendant is criminal and must be strictly construed.

Post Publishing Co. v. *Murray*, 230 Fed. 773 (cert. denied 241 U. S. 675);
France v. *United States*, 164 U. S. 676, 682;
United States v. *McGuire*, 64 F. 2d 485 (cert. denied 290 U. S. 645).

Appellant's contention[4] that the case may be properly decided upon the *broader* construction that the statute prohibits the mailing of a circular offering lottery paraphernalia upon an outright sale basis, is untenable, for no offense may be created in a criminal statute except by the words of Congress used in their usual and ordinary sense. There are no constructive offenses.

Viereck v. *United States*, 318 U. S. 236, 241, 243;
United States v. *Norton*, 179 F. 2d 527, 529.

A criminal statute must be strictly construed and not extended in its operation to persons not within its descriptive terms or the fair and clear import of the language used.

[4] P. 35, Government's Brief.

Schmokey v. *United States*, 182 F. 2d 937;
Martyn v. *United States*, 176 F. 2d 609, 610.

Criminal statutes should be given the meaning their language most obviously invites. Their scope should not be extended to conduct not clearly within their terms.

United States v. *Williams, et al*, 341 U. S. 70, 82.

It is well settled that when a rule of conduct is laid down in words that evoke in the common mind a fixed picture, the statute should not be extended simply because it may seem, to a prosecutor or a court, that another policy might apply, or upon the speculation that if the legislature had thought of it at the time of enactment, broader words would have been used.

McBoyle v. *United States*, 283 U. S. 25 (citing *United States* v. *Thind*, 261 U. S. 204, 209).

II

The Statute Was Not Designed or Intended to Apply to the Mailing or Advertising by Mail of Articles Which Might or Could Be Used by the Recipient to Conduct a Lottery.

The statutory language here involved first appeared in the Act of July 27, 1868 (15 Stat. 194, 196), making it unlawful to deposit material concerning lotteries in the mails, but fixing no penalty. Section 3894, Revised Statutes, Act of June 8, 1872, Chapter 335, Section 148 (17 Stat. 302) reenacted the prohibition except that the statute was directed against "illegal" lotteries and penalties for violation were fixed. By the Act of September 19, 1890, Chapter 908, Section 1 (26 Stat. 465), the Section was amended and the word "illegal" was deleted therefrom. In the same amendatory Act, Section 2 thereof amended Section 3929, Revised Statutes (now 39 U. S. C. 259), relating to the Postmaster General's power to issue so-called fraud orders against the conduct of lotteries and fraudulent

schemes through the mails, and Section 3 amended Section 4041, Revised Statutes (now 39 U. S. C. 732), relating to the Postmaster General's power to forbid payment of money orders drawn to the order of persons or concerns so engaged.

By the Act of March 2, 1895, Chapter 191 (28 Stat. 963), the so-called Anti-Lottery Legislation was enacted. Section 1 thereof is the present Importation and Interstate Lottery Carriage Section (now 18 U. S. C. 1301), and also prohibited deposit of advertisements of such lotteries in the mails; Section 2 invoked the provisions of Sections 3929 and 4041, Revised Statutes, supra (39 U. S. C. 259 and 732); Section 3 specifically retained Section 3894, Revised Statutes, supra (formerly 18 U. S. C. 336, 1940 ed., and now 18 U. S. C. 1302); and Section 4 extended the provisions of the Act of 1890 to ordinary mail matter as well as to registered letters.

The legislation has remained basically unchanged since 1895,[5] Sections 1 and 3 being incorporated into the Criminal Code by the Act of March 4, 1909, Chapter 321, as Section 237 (35 Stat. 1136) and Section 213 (35 Stat. 1129) respectively, appearing in Title 18, United States Code (1940 ed.), as Sections 387 and 336 respectively, and by the Act of June 25, 1948, into the Revised Title 18, United States Code, as Sections 1301 and 1302 respectively, effective September 1, 1948.

All three "lottery" statutes are thus in pari materia—all relating to the same subject matter and designed to ban the same thing, namely lotteries in interstate commerce and in the mails, with all having the same basic legislative origin. The manager of the bill (Representa-

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[5] ". . . the legislation passed upon in the Lottery Case [*Champion v. Ames*, 188 U.S. 321] is still the existing Congressional policy regarding lotteries (18 U.S.C. 1301-1303)." Letter of Attorney General, April 20, 1950, appearing on p. 13, H. R. Report No. 2769 to accompany S. 3357, 81st Cong., 2nd Sess.

tive Broderick) explained to Congress in recommending its passage, that the one *lottery* in the United States after having been driven out, had reorganized in Honduras and had been operating from that territory throughout the States of the Union. Vol. 7 pt 4, Congressional Record, page 3013.

The fraud order section (39 U. S. C. 259) includes the words, as the gravamen of the offense, "*engaged in conducting* any lottery, etc."

The companion criminal statute here involved contains, inter alia, the words "any letter, package, postal card, or circular concerning any lottery . . . offering prizes dependent in whole or in part upon lot or chance." The Government bases its case upon this part of the section.[6]

In its previous form as Section 336 of Title 18, United States Code (1940 ed.), which was in effect when the mailings were delivered prior to June 15, 1948 (R. 1, 2. 3), the section provided that none of the items named therein "shall be deposited in or carried by the mails of the United States, or be delivered by any postmaster or letter carrier." Parenthetically, it should be observed that the following Section 1303 of Title 18, United States Code (1948 Rev.), makes it an offense for any employee of the postal service to knowingly deliver "any letter, package, postal card, circular, or pamphlet advertising any lottery . . ."

The two criminal sections (now Sections 1301 and 1302 of Title 18 U. S. C.) and the civil sanction section (39 U. S. C. 259) have been interpreted judicially and administratively, to apply only to going lotteries, i.e. lotteries which are already set up and in existence, and in which the basic elements of an otherwise legal contract are present, including competent parties (a promoter or un-

[6] Appellant's Brief, p. 9.

derwriter and a player-customer), consideration, offer and acceptance.

As was said by this Court in *Francis* v. *United States*, 188 U. S. 375, 377, 378:

> "A ticket, of course, is a thing which is the holder's means of making good his rights. The essence of it is that it is in the hands of the other party to the *contract* with the lottery as a document of title." (Emphasis supplied).

In a general sense "lottery tickets" are more in the nature of choses in action . . . being in some respects memoranda of conditional promises to pay."

United States v. *Mueller*, 178 F. 2d 593.

In addition to consideration, chance and prize are the three elements necessary to constitute a lottery, all of which must be present.

Horner v. *United States*, 147 U. S. 449.

All of the earlier district (circuit) court cases brought under the statute in question and relied upon by appellant,[1] relate to lotteries already set up and in existence where the mails were used in the "conduct" of same. except that in *United States* v. *Mason*, 22 Fed. 707, the Court held that even in the face of a going lottery the statute could not be applied broadly and literally to the acts of a customer who wrote to the lottery operator ordering tickets in his lottery. The same is true as to *Boasberg* v. *United States*, 60 F. 2d 185, where the lottery was set up and offers to participate were made by the promoter through the mails. As pointed out by the court below in the instant case (R. 23), there is a substantial difference between that case and this, because

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[1] *United States* v. *Noelke*, 1 Fed. 426; *United States* v. *Zeisler*, 30 Fed. 499; *United States* v. *Fulkerson*, 74 Fed. 631; *United States* v. *Mason*, 22 Fed. 707.

here no offer was made by this defendant to the addressee, whereby the latter in exchange for a payment to defendant of an undetermined amount would be allowed to select a girl's name, which if drawn by lot by defendant from amongst other girls' names, would entitle him to a prize.

The Federal Trade Commission cases cited in the footnote on page 15 of appellant's brief are not in point, involving as they do decisions growing out of the civil law of unfair competition under Section 5 of the Federal Trade Commission Act of September 26, 1914 (38 Stat. 719)[8] as amended by the Act of March 21, 1938 (52 Stat. 111).[9]

Sometime after the decisions of this Court in *France* v. *United States*, (supra), and *Francis* v. *United States*, (supra), and the decision of the Circuit Court of Appeals for the Seventh Circuit in *Stockton* v. *United States*, 205 Fed. 462, and on the basis of the opinion of the Attorney General of the United States (22 Ops. A. G. 198), the law enforcement authorities of the Government for several years initiated or supported efforts[10] to obtain legislative authority to bring devices such as push cards and punchboards within the proscription of the anti-lottery mail statutes, including an amendment to the instant statute adding the following words to the first sentence: "or concerning any article, device or thing designed or intended for the conduct of such lottery, gift en-

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[8] *Helen Ardelle, Inc.* v. *Federal Trade Commission*, 101 F. 2d 718; *Bulte Bros.* v. *Federal Trade Commission*, 104 F. 2d 996; *National Candy Co.* v. *Federal Trade Commission*, 104 F. 2d 999.

[9] *Ostler* v. *Federal Trade Commission*, 106 F. 2d 962; *Hill* v. *Federal Trade Commission*, 124 F. 2d 104; *Loughran* v. *Federal Trade Commission*, 143 F. 2d 431.

[10] See Appendix, p. 24, for composite list of proposed but unsuccessful legislation.

terprise or scheme." The adoption of such language was advocated if pushcards and punchboards were to be brought within the prohibition of the Postal Anti-Lottery Statutes.[11] A Post Office Department spokesman appearing in favor of such amendment stated, ". . . the Department has for years taken the position that these devices, consisting of punchboards and prizes to be awarded by means of punchboards are not unmailable since they are not in fact lotteries until they are set up for operation."[12] The Postmaster General in his annual reports to Congress for years prior to 1932 recommended enactment of such an amendment to the present mail lottery statute

Official statements and recommendations by representatives of the Executive Branch to Congress in their testimony before Congressional Committees may be considered by the courts in interpreting an act.

Standard Oil Co. v. *Federal Trade Commission*, 340 U. S. 231 (Jan. 1951).

The statute remained unchanged until 1948, when it was revised into Section 1302 of Revised Title 18, United States Code. By administrative interpretations and rulings until November 1950, the plan of business for which defendant was indicted has had unrestricted access to

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[11] P. 4, Hearings, *Feb. 18, 1926*, before Subcommittee of the Committee on the Post Office and Post Roads, House of Representatives, 69th Cong., 1st Sess., on *H. R. 6982*, a Bill to Amend Criminal Code Title 18, Sec. 336, U.S.C., affixing penalties for use of the mails in connection with lottery paraphernalia; P. 3, Hearings, *Mar. 27, 1928*, before the Committee on Post Office and Post Roads, U. S. Senate, 70th Cong., 1st Sess., on *S. 2751*, a Bill to Amend Criminal Code Title 18, Sec. 336, U.S.C., affixing penalties for use of the mails in connection with lottery paraphernalia; P. 18, Hearings, *Apr. 21, 1932*, before Subcommittee of the Committee on Post Offices and Post Roads, U. S. Senate; 72nd Cong., 1st Sess., on *S. 182*, a Bill to Amend Criminal Code Title 18, Sec. 336, U.S.C., affixing penalties for use of the mails in connection with lottery paraphernalia.

[12] Hearings on S. 2751 (1928) and S. 182 (1932), referenced in Footnote 11, supra.

the mails without interference by the Postmaster General under the companion fraud order statute or under the non-mailable provision of the instant statute. In the latter year, the then Solicitor for the Post Office Department, twenty months after issuing a complaint, caused to be issued a "fraud order" under Title 39, United States Code, Sections 259 and 732, against a concern engaged in an almost identical plan of business, the enforcement of which was enjoined pendente lite by the United States District Court for the District of Columbia.

Crosby-Paige Industries, Inc. v. *Jesse M. Donaldson, Postmaster General,* Civil Action No. 5193-50, U. S. District Court for the District of Columbia.

It was the same Solicitor, who authored the "policy" enunciations quoted in Appellant's Brief at page 33—inter-office memoranda which have none of the dignity of an officially published ruling—the first of which preceded by two days the dismissal by that same official's office of two cases involving the identical plan and the same statute,[13] and the second of which followed twelve days later, informing postmasters that such material was not to be treated as non-mailable. Parenthetically, it should be observed that it was this same official who, as Chief of the Law Division of the Post Office Department, was responsible for the unlawful denial of the right of due process of law to litigants before his office charged with violation of the so-called fraud order statute, by refusing to recognize and apply the provisions of the Administrative Procedure Act of 1946 (60 Stat. 237, as amended; 5 U. S. C. 1001 et seq.). That refusal has now been repudiated in *Cates* v. *Haderlein, Postmaster,* ..... U. S. ....., No. 166, October Term 1951, certiorari granted October 8, 1951; reversing 189 F. 2d 369 and remanding on respondent's confession of error.

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[13] See Appendix, pp. 26-31.

The Government conceded in the court below, that the mailing of the pushcard in itself would not be a violation of the statute, apparently because in itself it is not a lottery and could not be used to conduct a lottery until someone set it up for operation as such. Since the circular letter accompanying the card contains the same information appearing on the card, how can it then be said that the circular letter "concerns" a lottery? Following the Government's line of reasoning a step farther, it can be assumed, arguendo, that there would be no offense if the two pieces of paper were mailed separately. In combination, exactly the same result obtains. Since the card itself is not a lottery, the circular letter referring to it does not "concern" a lottery.

The Government further argues here (Brief, p. 29 et seq.) that doubts of the Post Office Department (as to whether the statute applied to punchboards) seem to have been limited to the outright sale of boards by manufacturers, or at most to the outright and completed sale of the boards and prizes. In other words, if defendant had offered to sell one article of merchandise and one pushcard (which he does not do), there would be no violation. How then can it be now said that the giving away of a pushcard, as an advertising stunt to attract the reader's attention to defendant's merchandise, does greater violence to the intent of the law, merely because the circular letter accompanying the card "concerns" the card? The circular letter "concerns" the outright sale of merchandise—not a lottery. It is submitted that the background of the Department's official position and the position of the Department of Justice, establishes that an even closer approach to a lottery—a sale of lottery paraphernalia to one intending to put it to use—has never been considered a violation.

The attempted stretching of language having a definite and established meaning in an effort to justify a reversal

of a position previously adopted for more than thirty years, is best answered by pointing out that administratively the Department had the power and the duty to refuse in the first instance to accept for mailing any material concerning lotteries, gift enterprises or similar schemes offering prizes dependent in whole or in part upon lot or chance, for the instant statute in its previous form (18 U. S. C. 336, 1940 ed.) declared, inter alia, that such material shall not be deposited in the mails or delivered by any postmaster or letter carrier. The material here involved was admitted to the mails and delivered to the addressee notwithstanding the fact that the unsealed envelopes, as well as the cards, were subject to inspection at all times by the Post Office representatives under the third-class mailing permit granted by the Department.

Where, during the entire life of a statute, the executive departments charged with the administration and enforcement of an Act of Congress, have uniformly construed it as not including a given situation and where no prosecution has been successfully undertaken upon a different theory and Congress, well aware of the construction and practice, has significantly left the law in its original form, it follows that no offense is charged, when a different theory is later asserted.

United States v. *Farrar*, 281 U. S. 624, 634.

The position of the Government in bringing the indictment and this appeal, is incongruous. There is now pending before the Congress a Bill (S. 1624, 82nd Cong., 1st Sess.) prohibiting the importation, transportation, and mailing of gambling materials, etc., which Bill was favorably reported out by the Senate Committee on Interstate and Foreign Commerce on October 8, 1951. This Bill amends the instant statute (Section 1302) and the companion Section 1301 of Title 18, United States Code

(1948 rev.); reenacts the present language as a combined new Section 1301, and adds the words "gambling enterprises" to the present language, as well as specifically creating a new category of offending material by adding the words "punchboard" and "pusheard" and advertisements thereof. "S. 1624 revises the lottery law (Act of May (sic-March) 2, 1895) to include within its prohibitions other gambling enterprises, and punchboards and pushcards designed for gambling . . ."[14]

In the hearings before the subcommittee, the Attorney General of the United States and his assistants have stated, "Sections 1301 and 1302 of Title 18 . . . have been construed by the courts to be applicable only to lotteries and schemes having the characteristics of lotteries."[15] Suggestions were offered to distinguish between "punchboard" and "pushcard"—a representative of the Criminal Division, Department of Justice, stating, "A pushcard is a cardboard form usually transmitted in the mail . . ."[16]

Representatives of the Attorney General not only on the one hand seek a "broader" interpretation of the instant statute from this Court, at the same time tacitly representing to Congress that the existing statute does not encompass the activity in question, but go further and say to a Congressional committee proposing to amend this statute to include mailing of pushcards so as to prevent local use thereof, that: "There is some question as to the extent to which the Federal Government should

[14] P. 2, Report No. 928, Calendar No. 879, to accompany S. 1624, 82nd Cong., 1st Sess.; Appendix, p. 32; see also p. 6 for Committee's comparison of proposed changes in existing Law.

[15] P. 21, Hearings, Sept. 19, 20, and 21, 1951, before Committee on Interstate and Foreign Commerce, U. S. Senate, 82nd Cong., 1st Sess., on S. 1624.

[16] Ibid., p. 23.

get into a purely local field and something which has been heretofore pretty much purely a local field. If there is any reservation as to this bill, it is solely from that standpoint. The Department supports the object of the bill . . ."[17] Nothing was said or even remotely suggested with respect to the contention of the Department of Justice advocated in this case, that the instant statute serves the same purpose. See also letter of Attorney General dated April 21, 1937 with respect to H. R. 4796, 75th Congress,[18] in which the Attorney General expressed doubt as a matter of general policy that the Federal Government should undertake to legislate on the subject of transportation of gambling devices instead of leaving the matter to state and local regulation, and criticized as broad and indefinite the definition of "gambling device" in the bill because it would be difficult to determine what articles would come within its scope, such as playing cards and dice.[19]

In addition, the present Solicitor of the Post Office Department, who was Associate Solicitor when the events heretofore recited (supra, p. 11) took place, testified before the Committee, as follows:[20] "It is our position that in order that there be no question about the intention of Congress with respect to what is to be covered by the bill, that consideration be given to using general

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[17] P. 24, Hearings, Sept. 19, 20, and 21, 1951, before Committee on Interstate and Foreign Commerce, U. S. Senate, 82nd Cong., 1st Sess., on S. 1624.

[18] Referred to in Appendix, p. 24.

[19] P. 260, Hearings, Committee on Interstate and Foreign Commerce, House of Representatives, 81st Cong., 2nd Sess., on S. 3357 and H. R. 6736, Prohibition of Gambling Devices in Interstate Commerce, April, May and June 1950.

[20] P. 63, Hearings, Sept. 19, 20, and 21, 1951, before Committee on Interstate and Foreign Commerce, U. S. Senate, 82nd Cong., 1st Sess., on S. 1624.

words which would include every article, matter, thing, device or substance. We are afraid that if Congress attempts to specifically enumerate any of the articles by name and should any article be left out, the courts might then hold that the leaving out of this particular article meant that Congress intended that it was not to be covered.". The Postmaster General by letter to the Committee dated September 19, 1951, suggested the substitution of the language "purchase of, or in payment of any chance taken on any punchboard, pushcard or similar device," because he felt that the reference in the bill "for the purchase of any punchboard, pushcard or similar device" might well, as written, "be interpreted to apply only to the initial price paid by the purchaser of the entire punchboard or pushcard from the manufacturer or other distributor."[21]

When the bill (H. R. 6736, 81st Cong., 2nd Sess.) which, with S. 3857, finally became the Anti-Slot Machine Act of January 2, 1951 (64 Stat. 1134; 18 U. S. C. 1171), was under consideration in hearings before the Committee on Interstate and Foreign Commerce, a member of the Committee asked if the House bill included punchboards and was told by the author of the bill that it did, under the category of "apparatus."[22] The legislation as finally enacted, so restricted the definition of "gambling device" as to apply only to coin-operated slot machines.[23] A representative of the Solicitor General stated: "Actually, the bill that was before the conference on March 16 spe-

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[21] P. 62, Hearings, Sept. 19, 20, and 21, 1951, before Committee on Interstate and Foreign Commerce, U. S. Senate, 82nd Cong., 1st Sess., on S. 1624.

[22] P. 28, Hearings, April, May and June 1950, before Committee on Interstate and Foreign Commerce, House of Representatives, 81st Cong., 2nd Sess., on S. 3357 and H. R. 6736.

[23] Ibid., p. 51.

cifically included punchboards. But the conference struck it out, not because it was against hitting at those, but it was feared that the breadth of the definition might include so much as to make this bill really unworkable."[24]

Why then does the Attorney General and his assistants, together with the law officers of the Post Office Department, support and recommend new legislation to cover the mailing of punchboards and pushcards on the grounds that the present statutes do not apply, and almost concurrently other assistants urge before this Court that the instant statute covers the matters now pending before Congress?

The Congressional intent is clear. The instant statute does not embrace as a lottery the plan of business here involved. The Congress for many years has refused to enact amendatory legislation which would bring within the orbit of the statute the mailing of circulars, etc., concerning paraphernalia and devices which later could be used for lottery and gambling purposes. The reason is apparent. Congress did not then want to encroach upon state law enforcement policies.

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[24] Ibid., p. 52.

II

There Was No Lottery in Existence Either at the Time of Mailing or at the Time of Receipt of the Literature, and None of the Literature Complained of, Therefore, Is a "Circular Concerning Any Lottery . . . Offering Prizes Dependent in Whole or in Part Upon Lot or Chance . . ." as Alleged in the Indictment. The Circular in Question Is Not Employed as a Means to Further or Conduct Any Form of Lottery.

Counsel has been unable to find any reported Federal decision which even remotely holds that material which in the future could be used by the person in possession to set up a lottery or a gambling enterprise, is in itself a lottery in violation of the Federal lottery statutes when sent through the mails or transported in interstate commerce. The absence of reported decisions sustaining an alleged liability under a given set of facts raises a strong presumption that no such liability exists.

Western Union Telegraph Company v. Schriver, 141 Fed. 538;
Bank of Italy v. *Bentley*, 20 P. 2d 940; 217 Calif. 644.

On the other hand, while it is persuasive that no reported decision can be found to even remotely support the position of appellant, yet all decisions of the Federal courts known to counsel on the subject of lotteries in the mails and in interstate commerce, as well as administrative interpretations of the three Federal lottery statutes hold that it must be alleged and proved that a lottery must be set up and in existence at the time charged.

France v. United States, supra;
Francis v. United States, supra;
United States v. Irvine, 156 Fed. 376;
United States v. MacDonald, supra.

In *United States v. Bundy, et al*, No. 10,098, March Term 1938, an unreported decision of the District Court of the United States for the Southern Division of the Northern District of Alabama, an indictment under the same statute, involving the same plan of business as now before the Court, was dismissed on demurrer, the grounds for which are the same as here involved. No appeal was taken by the United States.

To have a going lottery, there must be present all of the elements thereof (supra, p. 8). For a circular to "concern" a lottery, there must be a lottery conforming to the required elements. The mailing in question offers no "chance ticket" to the recipient in exchange for a consideration, and offers him no prize, the award of which is dependent in whole or in part upon lot or chance. Defendant conducts no drawing and does not offer to do so. He merely offers to sell merchandise at a fixed price.

At common law, lotteries were recognized as legal, but were merely tolerated and were not approved.

Werts Novelty Co. v. *Chandler*, 20 F. Supp. 774.

"Gaming," "betting" and lotteries are separate and distinct things in law and in fact.

People v. *Postma*, 160 P. 2d 221; 68 Cal. App. 2, Supp. 814.

Any lottery scheme consists merely of a number of offers and acceptances upon consideration.

Affiliated Enterprises v. Waller, 5 A. 2d 251; 1 Terry 28 (Delaware).

To "make" in statute declaring it a crime to "make" or "draw" any lottery scheme or gift enterprise, means the setting up of a lottery and "draw" means the actual drawing to determine to whom the prizes shall be awarded.

State v. McNulty, 92 N. E. 2d 839, 842; 228 Ind. 497, 504.

Statutes prohibiting lotteries are devised to punish persons who actually operate or contrive to operate the lottery, rather than those who prepare material used in the lottery.

Hart Publications v. Kaplan, 37 N. W. 2d 814; 228 Minn. 512.

Even long-recognized gambling or betting transactions when conducted through the mails, (commonly known as "book-making,") have been held not to be within the meaning of the statute. "To hold otherwise would be to read into the statute a meaning that is not therein express, and that would be judicial legislation."

United States v. Rich, 90 F. Supp. 624.

The use to which a punchboard or other device is put is the only test as to whether it is a gambling device. The principal distinction lies in the manner of usage when used—not in design, construction, or possibility.

Coolidge v. Choate, 2 Met. 79, 83 (an early Massachusetts, case);
State v. Howell, 83 Mo. App. 198, 203;
Edwards v. American Express Co., 121 Iowa 744, 747, 748;
Stockton v. *United States*, (supra), 464, 465, 468.

Congress has now prohibited the use of the channels of interstate commerce in the shipment of gambling devices, but has specifically and in detail restricted the definition to mechanical pay-off coin-operated machines—so-called "slot machines."

Act of January 2, 1951, ch. 1194, 64 Stat. 1134, 15 USCA 1171 et seq.

IV

There Is No Offer Submitted to, or Solicitation Made of, the Addressee to Act as a Salesman or Agent of Defendant in the Distribution of Lottery Tickets.

The persons to whom the circulars are mailed are not agents of defendant either at the time of such mailing or at the time of receipt and would not become agents even though they operated the punchcard. There is no contract between defendant and the persons receiving the advertising literature, no consideration is passed and the recipient owes no obligation whatsoever to the defendant nor does the defendant owe any obligation whatsoever to him except perhaps to send him merchandise (if he elects to buy from defendant at the price offered) upon the receipt by defendant of an order accompanied by the price of such merchandise. The recipient, if he elects to invite others to take punches, may use any merchandise he pleases as prizes and he may buy it from any merchant he pleases and the defendant cannot complain. Any person using the card is completely independent of the defendant at all times and his discretion is limited in no way whatsoever by any undertaking, contract or understanding with the defendant. He can even alter the pushcard by obliterating any printing appearing thereon. Defendant conducts no drawing, does not know, and is not concerned with the result, of any drawing conducted by someone else. All he does is sell goods to those ordering same and for cash. The goods are not sent on consignment and no credit is extended. There is no commission involved, no report required and no representation arranged for. The transaction lacks all the requirements of the relationship of principal and agent or of master and servant. To create the relation of principal and agent there must be a contract of employment inferred or implied.

Uniontown Grocery Co. v. Dawson, 68 W. Va. 332; 69 S. E. 845.

Agency has been defined as a relationship founded on contract, express or implied, or created by law by which one is authorized to act for another in business dealings with third persons.

Steele v. Lawyer, 47 Wash. 266; 91 P. 958.

The Restatement of the Law of Agency gives the following definition of "agency":

> "Agency is the relationship which results from the manifestation of consent by one person to another that the other shall act in his behalf and subject to his control, and consent by the other so to act." (A. L. I. Restatement of the Law of Agency, Section 1, page 7).
>
> "An agency relationship exists only if there has been a manifestation by the principal to the agent that the agent may act on his account, and consent by the agent so to act." (Supra, Section 15, page 50).

The mailing piece in question makes no offer to employ the addressee as a salesman for, or agent of, defendant. Even though it be argued that it was the intention of defendant to suggest such employment (which is denied), there could be no such employment until the recipient affirmatively accepted, for "employment" can only come about through an agreement which satisfies the legal requisites of a valid contract. While there is no allegation that the addressees named in the indictment ever used the pushcards for any purpose, yet if such were the fact, then that person could only operate on his own, independently of defendant, and there is no presumption that even then he used the card in an unlawful manner. For example, a person recognizing the bargain qualities of the merchandise offered, could take all the punches on the card and thereby eliminate any element of chance

CONCLUSION

It is respectfully submitted that the appeal in this case should be dismissed, or in the alternative, that the decision of the United States District Court for the Eastern District of Wisconsin, should be affirmed.

HORACE J. DONNELLY, JR.

Counsel for Appellee

Of Counsel:

BRUNO V. BITKER
Of Bitker & Marshall
Milwaukee, Wisconsin

November 21, 1951.

APPENDIX

Excerpt from Hearings, April, May and June 1950, before Committee on Interstate and Foreign Commerce, House of Representatives, 81st Cong., 2nd Sess., on S 3357 and H. R. 6736; pp. 259-260:

The Congress Has Consistently Refused to Enact Any Such Law as That Here Proposed.

The Congress has on numerous occasions determined that it should not enact any bill on the subject dealt with in S. 3357 and H. R. 6736, evidently feeling that it should leave the subject to the States and municipalities.

From May 1919 to January 1941, the Congress had before it many bills on the subject covered by S. 3357 and H. R. 6736. On one occasion one House passed such a bill, and on another occasion the other House passed one. Extended hearings were held on some of these bills. Most of them ended in the committees. They were as follows:

Sixty-sixth Congress—S. 1541, Senator Sheppard. To bar gambling devices and lottery paraphernalia from the mails.

H. R. 1195, Representative Randall. To enable the Postmaster General to forbid payment of money orders in connection with exclusion from the mails of fraudulent gambling devices and lottery paraphernalia.

Sixty-eighth Congress—H. R. 6071, Representative Purnell. To prohibit importation and interstate transportation of gambling or chance slot machines or automatic vending machines or devices connected with chance devices.

Sixty-ninth Congress—H. R. 3935, Representative Purnell, Reintroduction of above.

H. R. 4004, Representative Dyer. To punish the unlawful transportation in interstate commerce or through the mails of gambling machines and fraudulent devices.

Seventieth Congress—H. R. 387, Representative Dyer. Reintroduction of above.

Seventy-first Congress—S. 2751, Senator Sheppard. Reintroduction of above.

H. R. 2408, Representative Dyer. Reintroduction of above.

Seventy-second Congress—S. 182, Senator Sheppard. Reintroduction of above.

H. R. 353, Representative LaGuardia. To provide penalties for use of the mails for gambling devices and lottery paraphernalia.

H. R. 7537, Representative LaGuardia. Reintroduction of above.

S. 2570, Senator Sheppard. Reintroduction of above.

Seventy-third Congress—S. 3076, Senator Copeland. Denying transportation in interstate commerce and transmission through the mails of gambling devices.

S. 2559, Senator Reynolds. Providing against transportation in interstate commerce and use of the mails to gambling devices and lottery paraphernalia.

Seventy-fourth Congress—S. 6, Senator Copeland. Reintroduction of above.

Seventy-fifth Congress—H. R. 4796, Representative Sachs. To amend the criminal code to prohibit the importation and interstate transmission of gambling devices.

Seventy-sixth Congress—H. R. 7464, Representative Geyer. To prohibit the transportation and receipt of gambling devices in interstate and foreign commerce.

POST OFFICE DEPARTMENT
Office of The Solicitor
Washington 25, D. C.

January 8, 1947.

In the Matter of Charges That the

MONARCH SALES COMPANY

at

Chicago, Illinois,

is engaged in conducting a scheme for the distribution of prizes by lot or chance in violation of 39 U. S. Code 259 and 732 (Sections 3929 and 4041 of the Revised Statutes, as amended), and of 18 U. S. Code 336.

F. & L. Docket 15/371

SPECIFICATION OF CHARGES AND MEMORANDUM RECOMMENDING THE ISSUANCE OF A CITATION TO SHOW CAUSE WHY A FRAUD ORDER SHOULD NOT BE ISSUED.

It is charged that the above named concern is engaged in conducting a scheme for the distribution of prizes by lot or chance, in violation of 39 U. S. Code 259 and 732 (Sections 3929 and 4041 of the Revised Statutes, as amended), and of 18 U. S. Code 336, which said scheme is in substance and effect as follows:

Said concern is obtaining remittances of money through the mails as the purchase price of punches which are in effect lottery tickets entitling the buyer to participate in the awarding of prizes by lot or chance through the operation of so-called punch boards containing said punches or lottery tickets, which are furnished to respondent's agents who are authorized in respondent's name and be-

half to sell said punches or lottery tickets entitling the purchasers to chances on the prizes offered by respondent and named upon respondent's punch boards, such agents being authorized to promise and warrant in behalf of respondent that said prizes named and offered upon said punch boards will be awarded to the ticket holders whose punches or tickets bear the winning names which are concealed under seals affixed to the punch boards furnished to respondent's agents, said agents being required to remit the purchase price of said punches or tickets before being supplied with the prizes aforesaid for delivery to the winners of the lotteries which are thus conducted by respondents through its agents, and the winners whereof are determined by the respondent by selecting and affixing under the seals on said punch boards the names to be awarded the prizes, which said punch boards, circular matter and instructions sent to agents and soliciting agency for the purpose of conducting said lotteries by means of and through the United States mails are more fully set forth and described in the photostatic reproductions thereof hereto attached.*

I, therefore, recommend that the said concern be called upon to show cause why a so-called fraud order should not be issued against the Monarch Sales Company and its officers and agents as such at Chicago, Illinois.

/s/ William C. O'Brien
Attorney in Charge
Fraud Section.

To the Solicitor

Of the Post Office Department.

*NOTE by Appellee: The photostatic reproductions attached to above, are identical in all basic respects with the exhibits in the instant case. (R. 7 through 18).

POST OFFICE DEPARTMENT
Office of The Solicitor
Washington 25, D. C.

January 30, 1948.

In the Matter of Charges That the

MONARCH SALES COMPANY

at

Chicago Illinois,

is engaged in conducting a scheme for the distribution of prizes by lot or chance in violation of 39 U. S. Code 259 and 732 (Sections 3929 and 4041 of the Revised Statutes, as amended), and of 18 U. S. Code 336.

F. & L. Docket 15/371

ORDER

The Government having voluntarily filed with the Chief Trial Examiner a request for the dismissal without prejudice of the complaint in these proceedings;

IT IS ORDERED that said request be and hereby is granted without prejudice.

(Signed) Daniel J. Kelly
Chief Trial Examiner

Entered at Washington, D. C.,
January 30, 1948.

POST OFFICE DEPARTMENT
Office of The Solicitor
Washington 25, D. C.

January 13, 1947.

In the Matter of Charges That the

HURON SALES COMPANY

at

Chicago, Illinois,

is engaged in conducting a scheme for the distribution of prizes by lot or chance in violation of 39 U. S. Code 259 and 732 (Sections 3929 and 4041 of the Revised Statutes, as amended), and of 18 U. S. Code 336.

F. & L. Docket 15/374

SPECIFICATION OF CHARGES AND MEMORANDUM RECOMMENDING THE ISSUANCE OF A CITATION TO SHOW CAUSE WHY A FRAUD ORDER SHOULD NOT BE ISSUED.

It is charged that the above named concern is engaged in conducting a scheme for the distribution of prizes by lot or chance, in violation of 39 U. S. Code 259 and 732 (Sections 3929 and 4041 of the Revised Statutes, as amended), and of 18 U. S. Code 336, which said scheme is in substance and effect as follows:

Said concern is obtaining remittances of money through the mails as the purchase price of punches which are in effect lottery tickets entitling the buyer to participate in the awarding of prizes by lot or chance through the operation of so-called punch boards containing said punches or lottery tickets, which are furnished to respondent's agents who are authorized in respondent's name and behalf to sell said punches or lottery tickets entitling the

purchasers to chances on the prizes offered by respondent and named upon respondent's punch boards, such agents being authorized to promise and warrant in behalf of respondent that said prizes named and offered upon said punch boards will be awarded to the ticket holders whose punches or tickets bear the winning names which are concealed under seals affixed to the punch boards furnished to respondent's agents, said agents being required to remit the purchase price of said punches or tickets before being supplied with the prizes aforesaid for delivery to the winners of the lotteries which are thus conducted by respondents through its agents, and the winners whereof are determined by the respondent by selecting and affixing under the seals on said punch boards the names to be awarded the prizes, which said punch boards, circular matter and instructions sent to agents and soliciting agency for the purpose of conducting said lotteries by means of and through the United States mails are more fully set forth and described in the photostatic reproductions thereof hereto attached.*

I, therefore, recommend that the said concern be called upon to show cause why a so-called fraud order should not be issued against the Huron Sales Company and its officers and agents as such at Chicago, Illinois.

/s/ William C. O'Brien
Attorney in Charge
Fraud Section.

To the Solicitor

Of the Post Office Department.

*NOTE by Appellee: The photostatic reproductions attached to above are identical in all basic respects with the exhibits in the instant case (R. 7 through 18).

POST OFFICE DEPARTMENT
Office of The Solicitor
Washington 25, D. C.

January 30, 1948

In the Matter of Charges That the

HURON SALES COMPANY,

at

Chicago, Illinois,

is engaged in conducting a scheme for the distribution of prizes by lot or chance in violation of 39 U. S. Code 259 and 732 (Sections 3929 and 4041 of the Revised Statutes, as amended), and of 18 U. S. Code 336.

F. & L. Docket 15/374

ORDER

The Government having voluntarily filed with the Chief Trial Examiner a request for the dismissal without prejudice of the complaint in these proceedings;

IT IS ORDERED that said request be and hereby is granted without prejudice.

(Signed) Daniel J. Kelly
Chief Trial Examiner

Entered at Washington, D. C.,
January 30, 1948.

Calendar No. 879

82D CONGRESS
1st Session

SENATE

REPORT
No. 928

PROHIBITING THE IMPORTATION, TRANSPORTATION, AND MAILING OF GAMBLING MATERIALS, BROADCASTING OF GAMBLING INFORMATION, THE TRANSMISSION OF BETS BY MEANS OF INTERSTATE COMMUNICATIONS, AND INTERSTATE TRANSPORTATION OF CERTAIN GAMBLING DEVICES

OCTOBER 8 (legislative day, OCTOBER 1) 1951.—Ordered to be printed

Mr. O'CONOR, from the Committee on Interstate and Foreign Commerce, submitted the following

REPORT

[To accompany S. 1624]

The Committee on Interstate and Foreign Commerce, to whom was referred the bill (S. 1624) to prohibit the importing, transporting, and mailing of gambling materials; to prohibit the broadcasting of gambling information; to prohibit the transmission of bets or wages by means of interstate communications; and to prohibit further the transportation of gambling devices in interstate commerce, having considered the same, report favorably thereon with amendments and recommend that the bill, as amended, do pass.

GENERAL STATEMENT

This bill was sponsored by the Special Committee To Investigate Organized Crime in Interstate Commerce as a major item in their program of proposed anticrime legislation. This bill is being reported together with two others (S. 1563 and S. 1564). It combines changes in existing laws with several new features, all aimed at Federal control of the interstate commerce aspects of organized crime as exposed by the special committee.

The improvements in the present law which are proposed herein are designed to supplement the law-enforcement activities of the several States and local communities. Legislation which closes the channels of interstate commerce to gangsters and racketeers who are now fattening on the illegal gambling industry has nothing to do with local prerogatives in this field; only by shattering existing multi-State syndicates can their segments be brought within the practical enforcement reach of local authorities. And this, Congress alone can do.

PURPOSE

S. 1624 revises the lottery law (act of May 2, 1895) to include within its prohibitions other gambling enterprises, and punchboards and pushboards designed for gambling; similarly it extends the present ban on broadcasting lottery information to include information relating to other gambling enterprises; it imposes a new restriction on the use of interstate communications facilities to transmit bets or wagers; and broadens the controlling definition in the Slot Machine Act of 1951 (Public Law 906, 81st Cong.) to tighten administration of that act.

SECTIONAL ANALYSIS

SECTION 1

Section 1 amends chapter 61 of title 18, United States Code, presently entitled "Lotteries" (18 U. S. C. 1301–1305), in its entirety, with a new title, "Lottery and Gambling Enterprises." The new chapter consists of seven sections.

The first of these, section 1301, consolidates the present prohibition against importing or shipping lottery devices in interstate commerce (18 U. S. C. 1301) with the present prohibition against mailing the same (18 U. S. C. 1302), and adds the words "gambling enterprise" throughout. The words "or similar scheme," i. e., schemes similar to lotteries and gift enterprise, are changed to read "scheme of any kind," so that the controlling definition will read, whenever it appears, "gambling enterprise, lottery, gift enterprise, or scheme of any kind offering money or other prizes dependent in whole or in part upon lot or chance." This new controlling definition is broad enough to bring illegal bookmaking and all other types of organized, nonsocial gambling within the purview of the statute. It will subject all professional gamblers to the limitation now imposed on lottery operators by confining all alike to exclusively intrastate bases of operation.

Subsection (a) of the new section 1301 closes the mails and interstate commerce to shipments, communications, receipts, offers, payments, and advertisements or solicitations relating to any enterprise or scheme coming within the controlling definition. The former penalty ($1,000 fine and/or 2 years' imprisonment) is retained. Offenses must be committed "knowingly" so that innocent carriers and agents will not be affected. The ban on advertisements, which affects reports in the general press, has been clarified by adding the words "to be," so that only reports of "prizes to be drawn or awarded" are affected, and legitimate news stories of results after the event are not interfered with. Punchboards and pushboards suitable for gambling, which the Crime Investigating Committee found to be widely distributed through organized crime channels, are included subject to the definition in subparagraph (d) discussed below.

Subsection (b) carries forward the prohibition and penalties directed against receipt of lottery materials imported or shipped in interstate commerce, presently contained in the law (18 U. S. C. 1301), with no substantive changes. The committee did not wish to reduce the scope of the present law in any way; on the other hand, it was not considered necessary to subject recipients of the newly proscribed material to penal sanctions. So subsection (b) retains the controlling

definition of the present law and merely reenacts the substance of the existing provision in toto.

Subsection (c), based on a recommendation made to the committee by the Post Office Department, gives that Department direct enforcing authority, to refuse to accept any material banned from the mails under subsection (a) and to withdraw the same in the event that it is discovered in the mails. This is a logical addition, consistent with the purposes of the bill and in accord with the authority of the department with respect to other objectionable matter, e. g., obscenity, in the mails.

Subsection (d) was inserted to qualify the absolute ban on punchboards and pushcards originally contained in subsection (a). The committee was convinced, by testimony taken at its hearings, that there is a valid distinction between boards manufactured as out-and-out gambling devices and amusement types, such as quiz boards. The former, according to the findings of the Crime Investigating Committee, have been frequently used like slot machines and other "location" gambling devices, by racketeering gangs who force them on retail outlets, sometimes by terroristic methods, as a means of collecting tribute. The latter, however, are innocuous and wholly incapable of any significant gambling or gangster use; the committee feels that possible end-use, through alteration of innocent types of boards by distributors or location owners, is a problem remote from the interstate responsibilities of Congress, and one appropriately left to local enforcement authorities. The two are separated by means of a carefully worked out definition. The basic functional distinction is that gambling boards must have numbers or amounts on each slip punched, while game and quiz boards have only a numerical key (i. e., consecutive numbering) to an accompanying answer sheet, or, in some types, no numbers at all, on the slips. This test is used, with the additional safeguard, to avoid ingenious evasions, that the latter must also be "designed and manufactured primarily for amusement purposes" to fall within the exclusion. The words "or similar device," originally used to modify "punchboards and pushcards" in subsection (a), have been deleted therefrom and carried into this definition, where they modify "such boards" and "cards," to make it plainer that only devices structurally and functionally similar to punchboards and pushcards are intended to be included.

The new section 1302 reenacts the present section (18 U. S. C. 1303), which imposes a special penalty ($100 fine and/or 1 year's imprisonment) on any postmaster or postal employee who acts as a lottery agent or knowingly violates the mail prohibitions imposed in subsection (a) of section 1301 (presently 18 U. S. C. 1302)—with the new controlling definition inserted so that the section, as reenacted, will be coextensive with subsection (a) as revised. The words "to be" are inserted before "drawn or awarded" to make the same clarification noted in subsection (a) supra.

The new section 1303 reenacts the present section (18 U. S. C. 1304), which makes it a criminal offense ($1,000 fine and/or 1 year's imprisonment) for any person to broadcast over a licensed radio station; or for any licensed broadcaster knowingly to permit broadcasting of any lottery information—with the new controlling definition inserted so that the section, as reenacted, will be coextensive with subsection (a) of revised section 1301. The words "to be" are

inserted before "drawn or awarded" to make the same clarification noted in subsection (a), supra.

The new section 1304 is an innovation, making it a criminal offense ($1,000 fine and/or 1 year's imprisonment) for any person "knowingly" to send or transmit in interstate or foreign commerce, by wire or radio, any bet, offer of a bet, or order for payment of a bet. This provision is directed at the "lay-off" and "come-back" betting operations of professional gamblers and bookmakers, and is an important point in the Crime Investigating Committee's program to drive organized crime out of interstate commerce. The committee strongly endorses the provision, but with a cautionary note that it is not directed at the casual, social bettor, and is not intended to loose a multitude of prosecutions on private citizens who have no connection with the professional gambling empires. No drafting technique seemed in anywise adequate to differentiate the latter in the statute itself; the matter is therefore left to sound discretion at the enforcement level, with reference to the maximum de minimus non curat lex and to analogous policies with respect to other similar laws, e. g., the Mann Act.

The new section 1305 reenacts the present section 1305 (18 U. S. C.) which exempts nonprofit fishing contests from the provisions of the chapter, with a new limitation that the exemption shall reach only "the sponsorship, management, or advertisement" of such contests. Without this limitation such contests might be made the basis of unlimited lottery or bookmaking operations, to defeat the expanded prohibitions contained in the new sections 1301 and 1304; with it, section 1305 still gives full protection to all legitimate activities directly related to such contests but affords no immunity in relation to gambling schemes based thereon by outsiders.

The new section 1306 is an exemption to protect the race tracks which are now lawfully operated, usually with legalized pari-mutuel betting, in 26 States. This industry, sanctioned by a majority of the States and important as a source of tax revenues, would have been severely hampered without such an exemption. The track managements are fully answerable to State laws and regulations, and have not been shown to be in any way connected with the illegal interstate gambling organizations which are the primary concern of the committee, the Congress, and the Federal Government. The same limiting phase used in section 1305, supra, "sponsorship, management, or advertisement," is used to make certain that, while the track managements themselves are left wholly free to conduct their operations and to employ contractors, suppliers, advertisers, etc., no stranger can claim immunity for prohibited activities merely because they are based on such track racing.

The new section 1307 was inserted at the suggestion of the Department of State, which pointed out to the committee that many reputable foreign publications would be barred from circulation in this country under the terms of section 1301 as revised, by virtue of their prohibiting news items about gambling enterprises in their own countries, e. g., the Irish Sweepstakes, the Loterie Nationale, etc. The practical consequences of circulating such items, carried in bona fide foreign publications, would seem singularly trifling; the loss, if such publications were withheld from American readers for this reason, would be great. The exemption is carefully restricted to

avoid abuses; the publication must be "distributed as a bona fide medium for news, information, or opinions" in a foreign country before it is eligible for this dispensation.

SECTION 2

The second section of the bill writes a new, simple definition into the Slot Machine Act of 1951 (act of January 2, 1951, 64 Stat. 1134). The Crime Investigating Committee found that this act, designed to control the interstate shipment of slot machines, which are a major item among the paraphernalia of gangster-gamblers, was being flaunted because the controlling definition therein was overtechnical. The prohibited machines had either to contain a "chum or reel with insignia thereon" or be "operated by means of the insertion of a coin, token, or similar object." New machines, designed to avoid these criteria, appeared almost at once. Moverover, the Crime Investigating Committee was impressed with the adaptability of certain types of pinball machines as perfectly equivalent substitutes for slot machines. These can be constructed to pay off in cash, like the slot machine, or to record amounts won, by a device known in the trade as a knock-off button, so that the operator and the location owner have a precisely recorded basis for dividing the profits from the machine. The committee feels that a generic description of all mechanical gambling devices of this type, including, at the suggestion of the Crime Investigating Committee, roulette wheels and similar devices, should be substituted for the present controlling definition in the act. That is what section 2 of the bill accomplishes.

The new definition would not affect the amusement-type pinball machine which pays off only in "free games" and has no device to record winnings, under the judicial holding that the mere right to play the device further is not a thing of value. *Washington Coin Machine Assn.* v. *Callahan* (142 Fed. 97 (C. A. D. C., 1944)).

A proviso was inserted at the end of the definition, as revised, to make certain that totalizers and other pari-mutuel equipment would not be included therein.

In view of this proviso, the language including roulette wheels and similar devices was changed from a parenthetical inclusion to an unqualified enumeration; to minimize the effects of the doctrine of inclusio unius est exclusio alterius. The committee believes that this change will make it possible to exclude most of the simple games and devices which are characteristic of itinerant carnivals, as the Crime Investigating Committee recommended, since the latter have no connection with organized illegal gambling, are allowed to operate in many States, and are primarily identified with the service of charitable and other worthy causes.

CHANGES IN EXISTING LAW

In compliance with subsection (4) of rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

TITLE 18, U. S. CODE

CHAPTER 61—LOTTERIES

[1301. Importing or transporting lottery tickets.]
[1302. Mailing lottery tickets or related matter.]
[1303. Postmaster or employee as lottery agent.]
[1304. Broadcasting lottery information.]
1301. Importing, transporting, or mailing gambling or lottery materials
1302. Postmaster or employee as gambling or lottery agent
1303. Broadcasting gambling or lottery information
1304. Transmission of bets and wagers by telephone, telegraph, or radio
1305. Fishing contests
1306. Public track racing events
1307. Bona fide foreign publications

[§1301. Importing or transporting lottery tickets

[Whoever brings into the United States for the purpose of disposing of the same, or knowingly deposits with any express company or other common carrier for carriage, or carries in interstate or foreign commerce any paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any advertisement of, or list of the prizes drawn or awarded by means of, any such lottery, gift enterprise, or similar scheme; or knowingly takes or receives any such paper, certificate, instrument, advertisement, or list so brought, deposited, or transported, shall be fined not more than $1,000 or imprisoned not more than two years, or both.

[§ 1302. Mailing lottery tickets or related matter

[Whoever knowingly deposits in the mail, or sends or delivers by mail:

[Any letter, package, postal card, or circular concerning any lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance;

[Any lottery ticket or part thereof, or paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance;

[Any check, draft, bill, money, postal note, or money order, for the purchase of any ticket or part thereof, or of any share or chance in any such lottery, gift enterprise, or scheme;

[Any newspaper, circular, pamphlet, or publication of any kind containing any advertisement of any lottery, gift enterprise, or scheme of any kind offering prizes dependent in whole or in part upon lot or chance, or containing any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes—

[Shall be fined not more than $1,000 or imprisoned not more than two years, or both; and for any subsequent offense shall be imprisoned not more than five years.]

§ 1301. Importing, transporting, or mailing gambling or lottery materials

(a) Whoever knowingly brings into the United States for the purpose of disposing of the same; or whoever knowingly deposits with any express company or any other carrier for compensation or carries in interstate or foreign commerce; or whoever knowingly deposits in the mail, or sends or delivers by mail—

any letter, package, postal card, or circular concerning any gambling enterprise, lottery, gift enterprise, or scheme of any kind offering money or other prizes dependent in whole or in part upon lot or chance;

any gambling or lottery ticket or part thereof; or paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of any gambling enterprise, lottery, gift enterprise, or scheme of any kind offering money or other prizes dependent in whole or in part upon lot or chance;

any punchboard or pushcard;

any check, draft, bill, money, postal note, or money order, for the purchase of any ticket or part thereof, or of any share or chance in any such gambling enterprise, lottery, gift enterprise, or scheme, or for the purchase of, or in payment of any chance taken on, any punchboard or pushcard;

Any letter, package, postal card, or circular containing any bet or wager, any offer of any bet or wager, or any check, draft, bill, money, postal note, or money order in payment of any bet or wager in connection with any gambling enterprise,

lottery, gift enterprise, or scheme of any kind offering money or other prizes dependent in whole or in part upon lot or chance; and

Any newspaper, circular, pamphlet, or publication of any kind containing any advertisement of, or soliciting any business in connection with, any gambling enterprise, lottery, gift enterprise or scheme of any kind, offering money or other prizes dependent in whole or in part upon lot or chance, or containing any list of the prizes to be drawn or awarded by means of any such gambling enterprise, lottery, gift enterprise, or scheme, whether such list contains any part or all of such prizes, or containing any advertisement of any punchboard or pushcard—

shall be fined not more than $1,000 or imprisoned not more than two years, or both; and for any subsequent offense shall be imprisoned not more than five years.

(b) Whoever knowingly takes or receives any paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any advertisement of, or list of, the prizes to be drawn or awarded by means of any such lottery, gift enterprise, or similar scheme, which have been brought into the United States or deposited with any express company or any common carrier for carriage, or carried in interstate or foreign commerce, shall be fined not more than $1,000 or imprisoned not more than two years, or both.

(c) All matter, the mailing of which is forbidden by subsection (a) hereof, is hereby declared to be nonmailable and shall not be conveyed in the mails nor delivered from any post office, nor by any letter carrier, but shall be withdrawn from the mails under such regulations as the Postmaster General may prescribe.

(d) For the purposes of this section the phrase "punchboard or pushcard" shall include such boards, cards or similar devices designed and manufactured primarily for use in connection with gambling, but shall not include devices numerically keyed to an answer sheet or containing no numerical identification of individual plays and designed and manufactured primarily for amusement purposes.

[§ 1303.] § 1302. Postmaster or employee as *gambling or* lottery agent

Whoever, being a postmaster or other person employed in the postal service, acts as agent for any *gambling or* lottery office, or under color of purchase or otherwise, vends *gambling or* lottery tickets, or knowingly sends by mail or delivers any letter, package, postal card, circular, or pamphlet advertising any *gambling enterprise*, lottery, gift enterprise, or [similar] scheme[,] *of any kind* offering *money or* prizes dependent in whole or in part upon lot or chance, or any ticket, certificate, or instrument representing any chance, share, or interest in or dependent upon the event of any *such gambling enterprise*, lottery, gift enterprise, or [similar] scheme, [offering prizes dependent in whole or in part upon lot or chance,] or any list of the prizes *to be drawn* awarded by means of any such *gambling enterprise, lottery, gift enterprise, or* scheme, *whether such list contains any part or all of such prizes,* shall be fined not more than $100 or imprisoned not more than one year, or both.

[§ 1304.] § 1303. Broadcasting *gambling or* lottery information

Whoever broadcasts by means of any radio station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisment of or information concerning any *gambling enterprise*, lottery, gift enterprise or [similar] scheme[,] *of any kind* offering *money or* prizes dependent in whole or in part upon lot or chance, or any list of the prizes *to be* drawn or awarded by means of any such *gambling enterprise*, lottery, gift enterprise, or scheme, whether *such* said list contains any part or all of such prizes, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Each day's broadcasting shall constitute a separate offense.

§ 1304. Transmission of bets and wagers by telephone, telegraph, or radio

Whoever knowingly sends or transmits, or causes to be sent or transmitted, in interstate or foreign commerce by means of telephone, telegraph, or radio any bet or wager, or any offer of any bet or wager, or any money or money order in payment of any bet or wager, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Each sending or transmission shall constitute a separate offense.

§ 1305. Fishing contests

The provisions of this chapter shall not apply with respect to *the sponsorship, management, or advertisement of* any fishing contest not conducted for profit wherein

prizes are awarded for the specie, size, weight, or quality of fish caught by contestants in any bona fide fishing or recreational event.

§ 1306. Public track racing events

The provisions of this chapter shall not apply with respect to the sponsorship, management, or advertisement of any track racing event to which the general public is admitted and upon which betting is legal under applicable State laws.

§ 1307. Bona fide foreign publications

The provisions of section 1301 of this chapter shall not apply with respect to the importation and distribution of any foreign newspaper, pamphlet, or other publication distributed as a bona fide medium for news, information, or opinions in any foreign country.

TITLE 15, U. S. CODE, SECTION 1171

(Prohibiting transportation of gambling devices in interstate and foreign commerce)

SEC. 1 (a) The term "gambling device" means—

(1) Any so-called "slot machine" or any other machine or mechanical device an essential part of which is a drum or reel with insignia thereon, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as a result of the application of an element of chance, any money or property; or

(2) any *other* machine or mechanical device *and roulette wheels and similar devices* designed and manufactured [to operate by means of insertion of a coin, token, or similar object and designed and manufactured so that] *primarily for use in connection with gambling and (A) which* when operated [it] may deliver, as the result of the application of an element of chance, any money or property [;], or *(B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property, provided that the provisions of this section shall not apply to pari-mutuel betting equipment or materials used or designed for use at race tracks where betting is legal under applicable state laws.*